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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. V. AMMANN, as Conservator for the LONG BEACH
FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

**NOTICE OF HEARING AND MOTION AND
APPLICATION FOR STAY FOR EXECU-
TION PENDING APPEAL.**

JAMES M. CARTER,
United States Attorney,

RONALD WALKER,
Assistant United States Attorney,

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Attorneys for Appellant.

RAY E. DOUGHERTY,
Associate General Counsel
Home Loan Bank Board,
Of Counsel.

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No.

IN THE
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FOR THE NINTH CIRCUIT

A. V. AMMANN, as Conservator for the LONG BEACH
FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

NOTICE OF HEARING OF MOTION AND
APPLICATION FOR STAY OF EXECU-
TION PENDING APPEAL.

*To: Paul Mallonee, C. H. Newhouse and Winnie Bucklin,
Plaintiffs and Appellees Herein, and to Westover and
Smith, Their Attorneys; and*

*Long Beach Federal Savings and Loan Association,
Defendants and Third Party Plaintiffs, and to Charles
K. Chapman, Its Attorney; and*

*Title Service Company, Defendant, Cross-Claimant in
Interpleader and Third Party Plaintiffs, and to
Thomas and Wallace, Their Attorneys; and*

*Robert H. Wallis, Defendant and Third Party Plain-
tiff, Defendant and Cross-Claimant in Interpleader,
and to Raymond Tremaine, His Attorney; and*

*Federal Home Loan Bank of Los Angeles, Third
Party Defendant and Cross-Complainant, and to
O'Melveny & Myers, Its Attorneys, and Richard Fitz-
patrick, Its Attorney; and*

*Federal Home Loan Bank of Portland, Third Party
Cross-Defendant, and to Bishop & Hoffman, Its
Attorneys:*

You and each of you will please take notice that on Monday, November 10, 1947, at the hour of 10:00 o'clock a. m. or as soon thereafter as counsel may be heard, appellant A. V. Ammann as conservator of the Long Beach Federal Savings and Loan Association, through his attorneys, will move the above entitled Court at its Court Room on the sixteenth floor of the United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, for an order staying execution pending appeal of the order of the District Court entered September 2, 1947, for interim partial allowance on account of expenses and attorneys' fees incurred by plaintiffs.

The motion will be made upon the grounds and based upon the material set forth in the motion and application for such stay of execution appended hereto and served herewith.

Dated this 9th day of October, 1947.

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
Assistant U. S. Attorney,
Attorneys for Appellant.

RAY E. DOUGHERTY,
Associate General Counsel
Home Loan Bank Board,
Of Counsel.

No.....

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. V. AMMANN, as Conservator for the LONG BEACH
FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

**MOTION AND APPLICATION FOR STAY OF
EXECUTION PENDING APPEAL.**

The appellant, A. V. Ammann as conservator for the Long Beach Federal Savings and Loan Association, presents herewith his motion and application for a stay of execution pending appeal from that certain order of the District Court for the Southern District of California entered September 2, 1947, for interim partial allowance on account of expenses and attorneys' fees in the above entitled matter and as a basis for said application respectfully shows:

1. The instant application for the stay of execution is directly connected with and is in aid of this Court's appellate jurisdiction in the appeal herein and is necessary in order to preserve the *status quo* and the subject matter of this appeal from dissipation.

2. On September 2, 1947, an order of the District Court for the Southern District of California was made

and entered ordering interim partial allowance on account of expenses and attorneys' fees in the total sum of \$67,-295.13 to be paid from funds in the registry of said District Court in connection with a proceeding entitled *Paul Mallonee, et al., v. John H. Fahey, et al., defendant*, No. 5421-PH; said payments to be made as follows:

To Shareholder Members Protective Committee for costs and expenses.....	\$15,530.29
To Westover & Smith, attorneys for plaintiffs, for costs and expenses.....	1,534.77
To Westover & Smith, attorneys for plaintiffs, on account of attorneys' fees.....	50,000.00

3. Thereafter and on September 10, 1947, appellant's application for a review of said order of September 2, 1947, by the three-judge court heretofore convened in said action in the District Court was denied.

4. A notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit has been duly and regularly filed pursuant to rule in the said District Court for the Southern District of California from the said order of September 2, 1947, allowing partial interim attorneys' fees and expenses and from the order denying a review thereof.

5. The Honorable Peirson M. Hall, Judge of said District Court for the Southern District of California, has unconditionally denied appellant's application for a stay of execution upon that part of the order allowing costs and expenses, and has conditionally denied appellant's application for a stay of execution upon that part of the order providing for payment of attorneys' fees to Westover & Smith, conditioned upon the filing of a bond with the Court providing for the repayment of the \$50,000.00 in

the event this Court, upon appeal, reverses the District Court herein.

6. Said appeal is taken by the direction of the Department of Justice of the United States of America acting through the Solicitor General. Pursuant to Rule 62 (e) of the Federal Rules of Civil Procedure, no bond, obligation or other security is required from appellant for an order staying execution.

7. The instant application for the stay of execution is directly connected with and is in aid of this Court's appellate jurisdiction in the appeal herein; that unless execution of said order is stayed during the pendency of this appeal said funds will be paid from the money in the registry of the said District Court; that a stay of execution is therefore necessary and appropriate to preserve the *status quo* and prevent loss and dissipation of the subject matter of this appeal.

8. This motion for a stay, pending appeal, is made upon the ground that appellant is entitled thereto pursuant to Rules 62 and 73 of the Federal Rules of Civil Procedure as of right, and that the interests of justice will be best served by the preservation of the *res* of said appeal in *status quo* pending the determination of this Court.

WHEREFORE, appellant prays that an order of this Honorable Court issue directed to the District Court for the Southern District of California staying execution in said Court of the order entered September 2, 1947, in the action entitled "Paul Mallonee, *et al.* v. John H. Fahey, *et al.*, being number 5421-PH, ordering interim partial allowance on account of expenses and attorneys' fees, pending the final decision of this Court upon the appeal taken therefrom.

I.

**A Brief History of the Course of Litigation in Which
Said Order of the District Court of September
2, 1947, Was Entered Is as Follows:**

a. The Long Beach Federal Savings and Loan Association was organized under Section 5 of the Home Owners' Loan Act of 1933, and is supervised by the Federal Home Loan Bank Administration. Pursuant to Section 5 (d) of that Act, specifically authorizing appointment of a conservator and regulations issued thereunder, A. V. Ammann was appointed, on May 20, 1946, conservator of the Association by the Federal Home Loan Bank Administration on the grounds that it had been determined that the Association was conducting its business in an unlawful, unauthorized and unsafe manner; that it had a management which was unsafe and unfit to manage a Federal savings and loan association; and that it was pursuing a course that was jeopardizing and injurious to the interests of its members, its creditors and the public. Said appointment was made by Federal Home Loan Bank Administration Order No. 5254, a copy of which is set out for convenience of the Court in the appendix hereto at page 27. Said conservator took peaceable possession of said Association on that day, and since that time, with the exception of the first two days in October, 1946, he has been charged with the exclusive management of the Association. On May 27, 1946, appellees Mallonee *et al.* (shareholders in the Association) brought this action in the District Court for the Southern District of California. They prayed for the return of the Association to the old management, as well as for other relief. Seeking to enjoin enforcement of Section 5 (d) on the ground that it was unconstitutional, appellees requested a three-judge court;

motions for preliminary partial relief were filed by appellees and motions to dismiss for failure to state a cause of action and for lack of jurisdiction of appellants (petitioners herein), and a hearing on these motions was held by the three-judge court on July 15, 1946. Meanwhile, the Association had in May, 1946, demanded, pursuant to Section 206.2 of the Regulations (footnote to *Fahey v. Mallonee*, appendix p. 40), a more definite statement of the causes for the conservator's appointment and such a statement was promptly furnished by the Bank Administration, a copy appearing, appendix, page 28. On May 30, 1946, the Association, through its president and secretary, demanded the administrative hearing provided by Section 206.2, which was promptly granted by Bank Administration Order No. 5309 and set for July 3, 1946, in the City of Los Angeles. The shareholder plaintiffs promptly added to their pending motion to enjoin a merger of the Association, motions for a preliminary injunction and for a temporary restraining order to restrain the holding of the administrative hearing. Although the Association through its president and secretary had demanded the administrative hearing, it orally joined in this motion and a temporary restraining order was immediately issued and subsequently made permanent. On September 5, 1946, the three-judge court issued an opinion holding Section 5 (d) unconstitutional as unlawfully delegating legislative authority, and on September 30, 1946, that court entered what amounted to a final decree, granting all relief prayed for by appellees' complaints, including the complete restoration of the old management, and a permanent injunction against appellants' "ever asserting any claim, right, title or interest" in or to the property of the Association.

b. The three-judge court denied any stay of enforcement pending appeal, and the old management was re-

turned to possession and control of the Association on the evening of September 30, 1946. On October 1, 1946, Mr. Justice Rutledge of the Supreme Court stayed execution of the decree (excepting the injunction against merger of the Association with any other institution), and ordered that if the old management had already taken possession of the Association, the conservator should be placed back in possession forthwith. On October 2, 1946, the conservator resumed possession and control and he has since been acting as such conservator.

c. An appeal from the decree of the three-judge court was immediately taken by appellants.

d. On November 9, 1946, appellees moved the Supreme Court to vacate the stay and to restore the Association to its old management pending the appeal. After a hearing before Mr. Justice Rutledge and a reference by him of the application to the entire Court, the motion was denied by the entire Court on December 9, 1946.

e. The cause was set for argument during the session commencing April 28, 1947, and after argument thereon, June 23, 1947, the opinion of the Supreme Court was handed down reversing the judgment of the three-judge court; said opinion being cited as *Fahey, et al., v. Mallonee, et al.*, 330 U. S., 67 S. Ct. 1552, 91 L. Ed. 1574, and printed herein for the convenience of the court, appendix, page 34.

f. During the pendency of the appeal to the Supreme Court, and prior to the decision therein, appellees in that cause secured from the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California (one of the judges composing the three-judge court), an order directing a hearing on the motions of appellees Mallonee *et al.* (shareholders), of

appellee Long Beach Federal Savings and Loan Association (acting through its former management), and of appellee Title Service Company, for interim orders approving and allowing costs and expenses to them, and approving and allowing attorneys' fees to their attorneys. These sums were to be payable out of the sum deposited in the registry of the District Court, in the course of this litigation, as explained in paragraph g. below.

g. During the course of the litigation in the District Court, an intervenor (Home Investment Company) deposited in the court's registry, pursuant to court order, the sum of approximately \$800,000, which sum represented amounts due to the Long Beach Federal Savings and Loan Association on account of loans made by it upon certain trust deeds, and said sums constituted payment in full of said loans. This money admittedly belongs to the Association. The deposits by said intervenor were made necessary by the refusal of the appellee Title Service Company (a corporation managed and directed by practically the same officers and directors who were in charge of Long Beach Federal Savings and Loan Association before the appointment of the conservator), which is the trustee under said trust deeds, to execute releases, and reconveyances thereof without such deposit, on the ground that the conservator was illegally in control of the Association. Accordingly, without objection, said sum was paid into the District Court's registry instead of directly to the Association and appropriate releases and reconveyances thereafter made. Subsequent petitions in intervention similar to that of the Home Investment Company have increased the amount deposited in the court registry to approximately \$1,200,000.00; \$50,000.00 of the sum in the court's registry represents a draft in that amount, payable to one Robert

H. Wallis, who filed a cross-claim in interpleader in connection with said draft. This check apparently represents one-half of the sum of \$100,000.00 appropriated by the Board of Directors of the Association, prior to the establishment of the conservatorship, for the purpose of litigation against the Federal Home Loan Bank Administration; the improper diversion of said sum was one of the reasons for the appointment of the conservator.

h. The movants also requested an allowance of attorneys' fees, likewise payable out of the above described fund, to attorneys for Mallonee *et al.* (shareholder plaintiffs), for the Long Beach Federal Savings and Loan Association, and for the Title Service Company. Allowances were requested for services in this litigation up to approximately March 6, 1947, and the right to request allowances for subsequent services was expressly reserved. The request was for allowances in reasonable amounts to be set by the District Court. Affidavits by two members of the California bar were filed which respectively valued the attorneys' services at \$125,000 and \$115,000.

i. A hearing was held on these motions before District Judge Peirson M. Hall on April 7, 1947, at which appellant Ammann strongly resisted the granting of such motions in whole or in part, and urged that the District Court was without power to grant said motions, both because of the stay issued by Mr. Justice Rutledge and continued in force by the Court, and because the case was then pending on appeal in the United States Supreme Court, and upon other grounds hereinafter set forth. Petitioner Fahey (the other appellant in the Supreme Court) did not appear at said hearing, since it was his contention that the lower court had no jurisdiction of his person.

j. After hearing, Judge Hall granted the motion with respect to costs and expenses, and also with respect to counsel fees for Messrs. Westover and Smith, counsel for the shareholder plaintiffs. On April 7, 1947, District Judge Hall orally directed Messrs. Westover and Smith to prepare a judgment, in accordance with his opinion delivered in open court, ordering the Clerk of the District Court to pay to the appropriate parties, out of the fund in the court's registry, the sum of \$17,295.13 to cover costs and expenses, and the sum of \$50,000.00 as an allowance for counsel fees to Messrs. Westover and Smith. Prior to the signing of a formal order thereon;

k. A petition for a writ of mandamus and/or prohibition and/or injunction was immediately filed in the Supreme Court seeking the appropriate writ against the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California, and on such petition a rule to show cause was issued directed to Judge Hall and he was thereby restrained from taking any further action in the matter of fees, and the said rule to show cause was set for argument immediately following the argument in the appeal from the decree of the three-judge court.

l. The application for the writ was denied by the Court on the ground that appeal to the appropriate court was the proper remedy and that the status of the conservator, having been fixed by the decision in the main case that the conservator could take any proper appeals at the proper time. *Ex parte John H. Fahey, et al.*, 330 U. S., 67 S. Ct. 1558, and printed herein for the convenience of the court, in the appendix hereto, page 47.

m. On September 2, 1947, as above stated, the mandate in the above named case having been spread on

August 19, 1947, findings of fact, conclusions of law and decree were entered in the fee matter; copies of such findings, conclusions and decree are set forth in the appendix hereto at page 49.

n. An application for a review by the three-judge court pursuant to Title 28, Section 792, U. S. C. A., of the order allowing interim attorneys' fees, costs and expenses was timely made, and on September 10, 1947, such application was denied. A copy of the order denying such review appears in the appendix at page 61.

o. Immediately upon the filing of the order denying review by the three-judge court a notice of appeal from the order allowing interim attorneys' fees, costs and expenses and from the order denying a review thereof by the three-judge court was filed. Thereafter and on September 11, 1947, an amended notice of appeal was filed, a copy of which appears in the appendix hereto at page 65.

p. Immediately upon the filing of an original notice of appeal, on September 10, 1947, an application was made in open court for an order staying execution of the order allowing interim attorneys' fees, costs and expenses pending appeal. An affidavit was filed in opposition to such application, which affidavit appears in the appendix hereto at page 66.

Q. On September 10, 1947, the application of appellant for a stay of execution pending appeal was denied by the District Court. Thereafter and on September 30, 1947, the formal order denying such stay of execution reciting certain conditions attached thereto was duly filed with the Clerk of the Court. A copy of such order denying stay of execution appears in the appendix hereto at page 79.

Summary of Material Included in Appendix.

For the convenience of the Court we have included in the appendix hereto the following material above referred to which may be useful for reference:

1. Order No. 5254 of the Federal Home Loan Bank Administration appointing A. V. Ammann conservator of the Long Beach Federal Savings and Loan Association.

2. More definite statement of the causes for the appointment on May 20, 1946, of the conservator for Long Beach Federal Savings and Loan Association, Long Beach, California.

3. Opinion of the Supreme Court of the United States rendered June 23, 1947, in the case of *Mallonee v. Fahey*.

4. Opinion of the Supreme Court of the United States rendered June 23, 1947, denying appellant's application for a writ of mandamus and/or injunction and/or prohibition in the matter of fees and expenses.

5. Findings, conclusions of law and order allowing interim attorneys' fees, costs and expenses.

6. Order denying a review by the three-judge court.

7. Amended notice of appeal.

8. Affidavit of Paul Mallonee in opposition to stay of execution.

9. Order denying stay.

II.

In the Opinion of the Attorneys for the Appellant the
Appeal in This Matter Is Meritorious in That
It Involves Serious Questions of Fact and Law.

It is the contention of appellant that:

1. The District Court erred in entering its order allowing attorneys' fees and costs in that said order was premature since such fees and costs are not allowable in a derivative shareholders' suit unless and until plaintiffs have been finally successful in their action.

2. The District Court erred in entering its order allowing attorneys' fees and costs out of the funds in the registry of the District Court since the efforts of plaintiffs neither recovered the fund for the benefit of the Association nor preserved it from dissipation.

3. The District Court erred in finding that the defendants John H. Fahey and A. V. Ammann intended to merge and consolidate the Association with other financial institutions and in finding that the filing and prosecution of the suit herein protected and preserved the Association and prevented merger and consolidation thereof with other institutions.

4. The District Court erred in entering its findings of fact, conclusions of law and judgment since such findings, conclusions and judgment are contrary to and in conflict with the decision and opinion of the Supreme Court of the United States in the case of *Fahey, et al. v. Mallonee, et al.*, 330 U. S., 67 S. Ct. 1552, in that the findings of fact wherein the Court found that the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Association with other finan-

cial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and membership and that the filing and prosecution of this lawsuit by the plaintiffs herein protected and preserved said Association and its assets, are without competent evidence to sustain them and are in direct conflict with said decision and opinion of the Supreme Court, particularly that part of said opinion and decision reading as follows:

“We find no explicit threat to merge the Long Beach institution and there is no such finding by the court below. The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or *of evidence to sustain one*, we accept the Government’s assurance that merger will not follow and, hence, we do not consider it necessary to discuss the legality of hypothetical mergers.” (Italics supplied.)

5. The District Court erred in finding the Shareholders’ Protective Committee was the plaintiff.

6. The District Court erred in finding that a controversy exists between the conservator and the Title Service Company which makes it impossible for the Title Service Company to determine whether reconveyances should be made.

7. The District Court erred in finding that persons having loans to the Association could obtain marketable title to their property only through the medium of this suit.

8. The District Court erred in finding that the legal services of Westover & Smith, representing the plaintiffs,

the Shareholder Members' Protective Committee, in their endeavor to protect and preserve the Association and its assets were of the value of \$50,000.00 or of any value whatever, in that said legal services did nothing to protect and preserve the Association nor to recover any of its assets and in the light of the subsequent decision of the Supreme Court such efforts were purely abortive and harmful rather than helpful to the Association.

9. The District Court erred in entering judgment prior to completion of the litigation.

10. The District Court abused its discretion in entering its order on September 2, 1947, upon the application for fees and argument thereunder, which was held on April 7, 1947, since in the interim the Supreme Court of the United States had reversed the judgment of the District Court and many of the conditions assumed as existing before the District Court on April 7, 1947, were completely changed by that reversal, yet no consideration was given to these changed conditions by the District Court before entering its judgment on September 2, 1947, said judgment being entered solely upon the application and record made and opinion rendered on April 7, 1947.

11. The District Court erred in making a final order allowing interim fees, costs and expenses since such order may not properly be made by a single judge in a case before a three-judge court under the provisions of Title 28, U. S. C. A., Section 792.

12. The District Court erred in denying review of its order by the three-judge court.

13. The District Court was without jurisdiction to enter judgment for attorneys' fees and expenses.

POINTS AND AUTHORITIES.

III.

The Filing of the Notice of Appeal Operated to Grant an Automatic Stay.

Rule 62(d), Federal Rules of Civil Procedure, provides:

“When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. . . . The stay is effective when the supersedeas bond is approved by the court.”

Rule 62(e) provides as follows:

“When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.”

Under the provisions of subsection (d) filing the notice of appeal and securing approval of the bond in and of themselves operate as a stay when a private litigant is appellant. No further action by the court is necessary. That is true under the rules and it was true under the prior statute. Moore's Federal Practice, Volume 3, page 3299, Section 62.04; Federal Redbook and Practice Annual, page 1.171.

Rule 73(a) of the Federal Rules of Civil Procedure supplants the petition for appeal, order allowing appeal and citation on appeal, which was the procedure following the enactment of Section 861(a), Title 28, U. S. C. A., abolishing writs of error. It substitutes the notice of appeal for the former procedure. The rights of the appellant are in no way changed.

Rule 62(d) and (e), Federal Rules of Civil Procedure, were patterned on and taken from Title 28, U. S. C. A., Sections 869 and 870. Sections 869 and 870 are, respectively, a restatement and codification of Revised Statute, Sections 1000 and 1001.

This statement is made because most of the cases construing the rights of appellants to a stay of execution pending appeal were decided under the statutes rather than under the rule. The statutes so restated by Rule 62(d) and (e) were construed in the following cases:

In *Hovey v. McDonald*, 109 U. S. 150, the court said:

“One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause. This includes a suspension of the power to execute the judgment or decree. But, of course, besides merely taking an appeal, those additional things must be done which the law requires to be done in order to give to the appeal a suspensive effect, whether it be security for the payment of the claim or to the condition imposed by law.”

In *Goddard v. Ordway*, 94 U. S. 672, the court said:

“A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf.”

For an appeal to operate as a supersedeas all that must be done is to comply with the requirements of the rules. What are the requirements of the rules as to an appeal being taken by direction of a department of the Government? How is such an appeal taken? Rule 73(a) tells us: “By filing with the District Court a notice of ap-

peal.” As to private suitors taking an appeal not by direction of a department of the Government another rule requirement exists: that of giving a supersedeas bond; but under Rule 62(e) there is no requirement for a supersedeas bond. Consequently, filing a notice of appeal is the only requirement made by the rule as to this appeal. Appellant has by filing notice of appeal complied with every requirement of the rules that is applicable to him. As the court said in the *Hovey* case, having appealed and having complied with every requirement which the law sets out, the appeal *ipso facto* operates to suspend the power of the lower court to execute the judgment or decree.

McCourt v. Singers-Bigger, 150 F. 102 (C. C. A. 8th), in construing the above statute, states the rule to be as follows:

“A supersedeas, like an appeal, *is a matter of right, and its allowance does not rest in the discretion of the court or judge.* ‘It follows, as a matter of law, from a compliance by the appellant with the provisions of the act of Congress in that behalf.’ *Goddard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237; 1 U. S. Comp. St. 1901, pp. 712, 714, 716, Secs. 1000, 1007, 1012. Section 1007, which provides that the defeated party may obtain a supersedeas, and may give the security required by law, *confers upon him the right so to do*, and leaves *no lawful power in the judge to refuse or disregard the supersedeas when the case is appealable*, the required security is given, and the other provisions of the statute in this regard are complied with. Section 1000, which directs that the justice or judge signing a citation shall take good and sufficient security that the plaintiff in error or

appellant 'shall answer all damages and cost where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas, as aforesaid,' imposes upon the justice or judge the duty to take adequate security, but it leaves to the defeated litigant the option to give such security for damages and costs, and in that way to obtain a supersedeas, or to give security for costs only, and thus to permit the judgment or decree to be executed immediately. The cases in which the writ or the appeal, as the case may be, is a supersedeas and stays execution, are determined by the provisions of the acts of Congress, and not by the opinion or discretion of the judge or justice. His only function is to determine whether or not the security offered is good and sufficient. If it is, it is his duty to take it, and upon his acceptance of it the execution of the judgment or decree is stayed. Where adequate security for damages and costs is presented in the time and manner prescribed by the statutes, the duty of the court to accept it is plain and imperative, and the law itself works the supersedeas. *Simpson v. First National Bank*, 129 Fed. 257, 260, 63 C. C. A. 371; *Lockman v. Lang*, 132 Fed. 1, 4, 65 C. C. A. 621; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Draper v. Davis*, 102 U. S. 370, 371, 26 L. Ed. 121."

Volume III of Moore's Federal Practice at page 3301 thereof states the rule as follows:

"Subdivision (e) is derived substantially from 28 U. S. C. Section 870. 'When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States,' and a stay is authorized un-

der other subdivisions of Rule 62, the United States, etc. is entitled to a stay without the necessity of giving bond, obligation or security. Thus where a money judgment was entered against a collector of customs, and an appeal was taken by direction of a department of the government, the appeal operates as a supersedeas.’ ”

There is only one thing in the rules which by even the remotest chance could make that conclusion other than crystal clear. That is the phrase in Rule 62(e) “and the operation or enforcement of the judgment is stayed.” But all that clause does is to take out of the class of cases in which the appeal operates as a stay those cases which are excepted in subdivisions (a) and (d) of Rule 62, that is, injunctions, etc., because that kind of judgments is not stayed at all except by special order.

The decision of the Supreme Court of the United States in *Schell v. Cochran*, 107 U. S. 625, supports the above conclusions. Sections 1000 and 1001 of the revised statutes to which the court refers in its opinion are Sections 869 and 870 of Title 28. In effect, they say what Rule 62(e) says, so that the *Schell* decision can be applied directly to the situation here. In that decision the court said at page 628:

“A writ of error in a case of this kind being brought by direction of a department of the Government operates as a supersedeas, under sections 1000 and 1001 of the revised statutes, without any bond to answer in damages being given.”

IV.

Even if the Granting of a Stay Is Discretionary With the Court, the Court Has Abused Its Discretion in Failing to Grant the Stay Unconditionally.

In the instant case the Court has ordered the paying out of approximately \$67,000.00 from funds in the registry of the court which funds unquestionably belong to the Association. The Conservator, whose duty it is to preserve these funds for the benefit of its members, protests such payment on behalf of the members. Courts should not be hasty to pay out large sums of money for counsel fees where the litigation involves, after all, only the right to management of the property and assets of the institution. There is a serious dispute here as to the right of the Court to pay out these funds. That dispute should be settled by this Appellate Court. Whether or not the Conservator is right in his contentions, the fund should be preserved intact and the *status quo* maintained until this Court has had the opportunity to exercise its appellate jurisdiction.

Conclusion.

The Court has ordered payment of approximately \$67,000 on account of fees, costs, and expenses. The correctness of such order is in dispute. An appeal has been taken to this Court. Such appeal was promptly, in fact *immediately* taken. Appellant has a clear right to have this Court pass on the merit of such an appeal.

The fund which is the *res* of this appeal should remain undisturbed pending this Court's decision. For the lower court to permit a change in the status of this *res* pending appeal, is to trespass upon the function of the Appel-

late Court and to disturb its effective appellate jurisdiction by permitting the *res* to be dissipated.

Consider the terms of the order denying a stay.

As to the \$17,065.06 allowed for costs and expenses, *immediate* and unconditional payment to the "Shareholder Members Protective Committee" is allowed. If this Court should reverse the District Court, it is highly problematical whether the sum could be recovered. It is doubtful indeed if such committee is a sueable entity, and the liability of its members is speculative if not remote. The licensing of such a committee by the Corporation Commissioner of the State of California gives it no status except to permit the solicitation of funds and acceptance of contributions from other shareholder members.

A serious question is presented that the payment of this sum would moot the appeal. At best a decision favorable to appellant would only present him with a right to pursue further and vexatious litigation with ultimate collection improbable.

As to the \$50,000 attorneys' fees, the Court, by requiring a bond from the appellee to repay, has recognized the fact that this Court may reverse. But the posting of a bond, even if a precedent or statutory authorization for such bond be found, does not preserve *status*.

Here, too, a successful appellant instead of finding his position restored intact, is presented with a right to bring new litigation to restore the status, this time a right carrying security for collection.

The order by its very terms is an open invitation to multiplicity of suits and vexatious and troublesome liti-

gation. Surely sound logic cannot contemplate that a successful appellant is to be placed in this position.

We contend that the cases hereinabove cited, if they go no farther, conclusively establish the right of a private litigant in a case such as this to obtain a supersedeas by the filing of a bond. Under the terms of Rule 62(e) a bond is not required of the government. The reason for this rule, we believe, is a recognition of the financial responsibility of the government, and perhaps also an acknowledgment of the *bona fides* of an appeal taken at the direction of, and with the authorization and approval of the Solicitor General.

But the lower court has in its interpretation penalized the government because the Federal Rules grant it a privilege not extended to private litigants. Reduced to syllogistic terms the fallacy in the reasoning of the lower court becomes at once apparent:

Major Premise: A private litigant may obtain a supersedeas as of right by the posting of a bond.

Minor Premise: The government is relieved of the requirement of posting bond.

Conclusion: The government may not obtain a supersedeas as of right.

The voluminous, hybrid order denying the stay of execution, reciting several pages of attempted justification for the Court's denial, attaching as exhibits two prior orders already a part of the record, and conditioned upon the unprecedented requirement that the appellee file a bond is, to say the least, rather unusual. The solicitude of the Court in attempting to preserve for the govern-

ment a *secured* right to seek recovery of 75% of the lost funds is recognized. Nevertheless the Court has violated the right of appellant to an unconditional stay of execution pending the outcome of the appeal.

Is it not more in line with orderly procedure to maintain the *res* of the appeal intact and to preserve the *status quo* pending a speedy determination of the appeal?

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

RONALD WALKER,
Assistant United States Attorney,
Attorneys for Appellant.

RAY E. DOUGHERTY,
Associate General Counsel
Home Loan Bank Board,
Of Counsel.

APPENDIX.

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5254

Date May 20, 1946

Whereas, it has been determined that the Long Beach Federal Savings and Loan Association, Long Beach, California:

Is conducting its business in an unlawful manner;

Is conducting its business in an unauthorized manner;

Is conducting its business in an unsafe manner;

Has a management which is unsafe to manage a Federal savings and loan association;

Has a management which is unfit to manage a Federal savings and loan association;

Is pursuing a course that is jeopardizing the interests of its members;

Is pursuing a course that is jeopardizing the interests of its creditors;

Is pursuing a course that is jeopardizing the interests of the public;

Is pursuing a course that is injurious to the interests of its members;

Is pursuing a course that is injurious to the interests of its creditors; and

Is pursuing a course that is injurious to the interests of the public; and

Whereas, it has been determined to be in the interest of said association, its members, creditors, and the public to appoint a conservator to take possession of said asso-

ciation and to conserve its assets pending further disposition of said association and its affairs:

Now, Therefore, A. V. Ammann is hereby appointed conservator for the Long Beach Federal Savings and Loan Association, Long Beach, California, to take possession of said association and to conserve its assets pending further disposition of said association and its affairs; and, as such conservator, to have and exercise all of the powers and rights, enjoy all of the privileges, and assume and perform all of the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System, and orders issued by the Federal Home Loan Bank Administration, or otherwise.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1946.

J. FRANCIS MOORE,
Secretary.

MORE DEFINITE STATEMENT OF THE CAUSES FOR THE
APPOINTMENT ON MAY 20, 1946, OF THE CONSER-
VATOR FOR LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION, LONG BEACH, CALIFORNIA.

T. A. Gregory
350 East Fourth Street
Long Beach 2, California

The following is a more definite statement of the causes for the appointment on May 20, 1946, of a Conservator of the Long Beach Federal Savings and Loan Association:

1. Said Association, in the opinion of the Federal Home Loan Bank Administration, was conducting its business in an unlawful, unauthorized, and unsafe manner, and was pursuing a course that was jeopardizing and injurious to the interests of its members, creditors, and the public in that:

(a) During the period from September 11, 1945, to March 7, 1946, disbursements of funds of said Association totaling \$14,500 were made to its President, T. A. Gregory, without proper voucher therefor, or explanation thereof in the records of the Association, itemized as follows:

September 11, 1945	T. A. Gregory	\$1000.00
October 22, 1945	Wired to T. A. Gregory, Wash., D. C.	1000.00
November 5, 1945	Wired to T. A. Gregory, Wash., D. C.	1000.00
November 24, 1945	T. A. Gregory	1000.00
December 1, 1945	Wired to T. A. Gregory, Wash., D. C.	2000.00
January 19, 1946	T. A. Gregory	2000.00
January 31, 1946	Cash (Wired to T. A. Gregory)	1500.00
February 20, 1946	Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
February 28, 1946	Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
March 7, 1946	Cash (Wired to T. A. Gregory at Wash., D. C.)	1000.00
Total		<hr/> \$14,500.00

(b) Disbursements totaling \$14,500, itemized under (a), were used for purposes beyond the scope of the Association's business.

(c) Funds of the said Association totaling \$2455.60 were disbursed to Howard S. Leroy, an attorney at law at Washington, District of Columbia, on or about January 30, 1946, January 31, 1946, and March 6, 1946, although said attorney had not been retained by the said Association, nor were such funds paid to said attorney for the handling of any business of the said Association, or otherwise for the benefit of said Association.

(d) The Board of Directors of said Association attempted in the following manner to relieve T. A. Gregory from accountability to the said Association for its funds used by him for purposes beyond the scope of the said Association's business:

(1) The said Board of Directors, according to the minutes of a special meeting, dated January 16, 1946, voted to compensate T. A. Gregory retroactively in the sum of \$11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment.

(2) The said Board of Directors, according to the minutes of the special meeting, dated January 16, 1946, voted to increase T. A. Gregory's salary from \$8250 to \$20,000 per year.

(3) On April 6, 1946, reimbursement of said Association's funds paid to T. A. Gregory and used

by him for purposes beyond the scope of the Association's business, was recorded on the books of said Association by means of an offset against the purported liability of the Association to T. A. Gregory for the said sum of \$11,750 and for the voted increase for the first three months of 1946.

(e) The Association, by vote of its Board of Directors, purportedly on January 16, 1946, undertook to compensate T. A. Gregory retroactively in the sum of \$11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment, said purported retroactive salary increase being unlawful and unauthorized.

(f) The Association paid salaries and fees which were excessive and not commensurate with the services rendered.

(g) The Board of Directors of said Association on May 8, 1946, appropriated the sum of \$100,000 of the funds of said Association for the purpose of restraining the proper use of safeguards and controls provided by the Congress of the United States with respect to Federal Savings and Loan Associations, and threatened the removal of said sum from the proper control of said Association.

(h) During the course of a regular examination commencing on May 18, 1946, by Examiners of the Federal Home Loan Bank Administration, a director and officer of the said Association unlawfully and improperly removed a cashier's check in the amount of \$50,000, payable to the said Association and representing funds belonging to it, without accounting therefor.

(i) On or about May 8, 1946, the said Association, through its officers, executed a purported lease on a hotel property located at 332 American Avenue, Long Beach, California, owned by it to one George Turner for a 20-year period on terms which, in effect, would give to the said Turner the use of said property without adequate consideration therefor to the said Association.

(j) Said Association was being used for the personal gain of one or more officers and directors thereof, to the detriment of its members and creditors.

(k) Said Association, through its officers, engaged in activities which were inimical to the interests of veterans of the Armed Forces, including veterans of the Armed Forces who were members of the said Association.

(l) Certain directors of the said Association, namely: T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, on or about May 18, 1946, undertook to convert, or attempted to convert, their shareholdings and other funds totaling approximately \$21,000 into approximately 21,000 separate purported share accounts of \$1.00 each, in violation of the rights of over 16,000 share account holders of said Association, and in violation, or attempted violation of their duties as directors.

(m) Said Association failed to file copies of audit of said Association made by F. W. Lafrentz & Co., Certified Public Accountants, Los Angeles, California, as of the close of business May 19, 1945, or thereabouts, as required by Section 203.2 of the Rules and Regulations for the Federal Savings and Loan System.

(n) The said Association failed to maintain its books of accounts and records correctly.

(o) The records or statements of the Association were falsified in that either

(1) The minutes of the Board of Directors' meeting of January 16, 1946, were falsified by the entry therein of actions by said Board purporting to have been taken increasing T. A. Gregory's salary from \$8250 to \$20,000 per year, and purporting to authorize the payment of \$11,750 to T. A. Gregory as extra compensation for the year 1945,

or

(2) The said Association's liabilities were misrepresented by the Board of Directors to the Federal Home Loan Bank Administration in monthly reports for the months ending January 31, 1946, February 28, 1946 and March 30, 1946.

2. Said Association, in the opinion of the Federal Home Loan Bank Administration, had a management which was unfit and unsafe to manage a Federal Savings and Loan Association in that, among other things,

(a) The matters set forth in sub-items (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) of Item 1, above are herein incorporated by reference.

(b) T. A. Gregory in 1934 (but only recently known to the Federal Home Loan Bank Administration) acquired control of the Reliable Building-Loan Association, Long Beach, California, and so manipulated its affairs that he was enabled to acquire, through the medium of Somerset Finance Co., a substantial number of certificates of the Reliable Building-Loan Association at a small fraction of their true value, and subsequently redeemed said cer-

tificates at the Reliable Building-Loan Association at their true value, while like treatment was denied to others, all to the detriment of the members of the said reliable Building-Loan Association, and to his own personal gain.

(c) The officers of said Association failed to keep or cause to be kept the books of account and records of the Association correctly.

J. ALDRICH HALL,
*Attorney for Federal Home Loan Bank
Administration.*

Dated: May 29, 1946.

, Supreme Court of the United States.

No. 687.—October Term, 1946.

John H. Fahey and A. V. Ammann, Individually and Respectively as Federal Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association, Appellants, v. Paul Mallonee, et al.

[June 23, 1947.]

Appeal from the District Court of the United States for the Southern District of California.

Mr. Justice Jackson delivered the opinion of the Court.

A specially constituted three-judge District Court has summarily, without trial, entered final judgment ousting a Conservator who, on orders of the Federal Home Loan Bank Commissioner, had taken possession of the Long Beach Federal Savings and Loan Association. It granted this and other relief on the principal ground that §5(d) of the Home Owners Loan Act of 1933, as amended, violates Article I, §§1 and 8 of the Constitution.

The Federal Home Loan Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession. The grounds assigned were that the Association was conducting its affairs in an unlawful, unauthorized and unsafe manner, that its management was unfit and unsafe, that it was pursuing a course injurious to, and jeopardizing the interests of, its members, creditors and the public. Plaintiffs at once commenced this class action in the right of the Association against the Conservator and Fahey, Chairman of the Federal Home Loan Bank Board, the Association as a nominal defendant, and several others not important to the issue here. The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution. It asked return of the Association to its former management, permanent injunction against further interference, and other relief. Other parties in interest intervened. Temporary restraining orders issued and a three-judge court was duly convened.

Personal service was secured upon Ammann, the Conservator, but Fahey, the Federal Home Loan Bank Commissioner, officially an inhabitant of the District of Columbia, could not be served in California. A motion for substituted service, therefore, was granted and process was served upon him in the District of Columbia. It was believed that this was authorized by Judicial Code, §57, 28 U. S. C. §118. Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action. Fahey appeared specially to move dismissal

or quashing return of service on him upon the ground that he could not, in his official capacity, be sued in California and had not been served properly with process. Neither had answered the complaint, nor had their time to do so expired, when final judgment was granted against them.

The three-judge court set a variety of pending motions for argument and, after argument mainly on the constitutionality of §5(d), with only pleadings and motion papers before it, held the section unconstitutional, ordered removal of the Conservator, permanently enjoined the authorities from holding an administrative hearing on the matter, permanently enjoined an apprehended merger, restored the institution to its former management, ordered the Conservator to account and enjoined these authorities "from ever asserting any claims, right, title or interest" in or to the Association's property. The case is here on direct appeal. 50 Stat. 752-53, 28 U. S. C. §§349a, 380a.

It is manifest that whatever merit there may be in various subsidiary and collateral questions, this drastic decree can stand only if the section, as applied here, is unconstitutional.

Its defect is said to consist of delegation of legislative functions to the supervising authority without adequate standards of action or guides to policy. Section 5(d) of the Act gives to the Board "full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such as-

sociations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.” 48 Stat. 133, 12 U. S. C. §1464(d). This, the District Court held was unconstitutional delegation of the congressional function. It relied on *Panama Refining Co. v. Ryan*, 293 U. S. 388, and *Schechter v. United States*, 295 U. S. 495.

Both cited cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities. Chief Justice Hughes emphasized these features, saying that the Act under examination was not merely to deal with practices “which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general dec-

laration of policy in section one.” *Schechter v. United States*, 295 U. S. 495, 535.

The savings and loan associations with which §5(d) deals, on the other hand, are created, insured and aided by the federal government. It may be that explicit standards in the Home Owners Loan Act would have been a desirable assurance of responsible administration. But the provisions of the statute under attack are not penal provisions as in the case of *Lanzetta v. New Jersey*, 306 U. S. 451, or *United States v. Cohen Grocery Co.*, 255 U. S. 81. The provisions are regulatory. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards. A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in unchartered fields.

The Board adopted rules and regulations governing appointment of conservators. They provided the grounds upon which a conservator might be named,¹ and they

¹The Rules and Regulations for the Federal Savings and Loan System provide in part as follows:

PART 206. APPOINTMENT OF CONSERVATOR OR RECEIVER.

§206.1. *Receiver or conservator; appointment.* (a) Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) Is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) Is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) Cannot with safety continue in business;

(4) Is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) Is in imminent danger of becoming impaired;

(6) Is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) Has suspended payment of its obligations;

(8) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) Has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) Has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration,

the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Gover-

(Footnote 1 continued on p. 40.)

are the usual and conventional grounds found in most state and federal banking statutes.² They are sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review if there should be a proper occasion for it.

nor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor.

§206.2. *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine. (Footnote 1 continued on p. 41.)

It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this

mine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration.

§206.4. *Discharge of conservator or receiver.* An order of the Federal Home Loan Bank Administration discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Federal Home Loan Bank Administration discharging a receiver and returning the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revert in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. 24 C. F. R. Cum. Supp. §206.1 *et seq.*, as amended, 24 C. F. R. 1943 Supp. §206.1.

²Bank Conservation Act of March 9, 1933, §203, 48 Stat. 2-3, 12 U. S. C. §203; Banking Act of 1933, §31, 48 Stat. 194, 12 U. S. C. §71a; National Housing Act, §406, 48 Stat. 1259-60, 12 U. S. C. §1729. *E. g.*, New York Banking Law, §606, 4 McKinney's Consolidated Laws of New York 708-709, (pocket part) 125-26; Page's Ohio General Code Ann., §687; 1 Deering's California General Laws, Act 986, §13.11; Massachusetts Laws Ann. c. 167, §22; c. 170B, §4; Jones Illinois Stat. Ann., §14.40.

summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional.³

In this case an administrative hearing was demanded and specifications were asked as to the charges against the management of the Association. The hearing was granted and a statement of complaints against the management was furnished.

The causes for the appointment of a conservator as therein set forth by the Board included withdrawals by the president without proper voucher therefor; payment of salaries and fees not commensurate with services rendered; a director's unlawful removal of a cashier's check in the amount of \$50,000 during an examination by Federal Home Loan Bank examiners; leasing properties of the Association for a twenty-year period on terms which would not provide adequate consideration to the Association; use of the Association for personal gain of one or more officers and directors; failure to maintain proper accounts and to make proper reports; and falsification of records. It also charged certain manipulations of the affairs of another institution by the president of this institution.

The plaintiffs nevertheless demanded and obtained an injunction to prevent the administrative hearing and they have therefore cut off the making of a record as to whether these charges are well-founded. Nor did the trial court take evidence on the subject. We must assume that the supervising authorities would be able to sustain the

³See note 2.

statements of fact and to justify the conclusions in their charges for the purpose of determining the case without trial. We are therefore unable to agree with the court below that the section is invalid and hence that regardless of the charges the management was free to go on undisciplined and unchecked.

But even if the section were defective, which we think it is not in a constitutional sense, another obstacle stands in the way of ousting this conservator.

The Long Beach Federal Savings and Loan Association was organized in 1934 under §5 of the Home Owners Loan Act of 1933, subsection (d) of which is now sought to be declared unconstitutional. The present management obtained a charter which provided that the Association "shall at all times be subject to the Home Owners' Loan Act of 1933, providing for Federal savings and loan associations, and to any amendments thereof, and to valid rules and regulations made thereunder as the same may be amended from time to time," and that it might be "liquidated, merged, consolidated, or reorganized, as is provided in the rules and regulations for Federal savings and loan associations." In 1937, upon the Association's request, an amended charter was issued which likewise provided that the Association was to exercise its powers subject to the Home Owner's Loan Act and regulations issued thereunder.

This is a stockholder's derivative action in which plaintiffs sue only in the right of the Association. It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *United States v. San Francisco*, 310 U. S. 16, 29. As formu-

lated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses which its management may perpetrate. It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named.

There are other important and difficult questions raised in the case which it becomes unnecessary to decide.

Objection is made to the administrative hearing upon the ground that it is before the same authority which has preferred the charges and that it cannot be expected therefore, to be fair and impartial and that the Act does not provide for judicial review of the Board's determination on the hearing. We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted. We do not now decide whether the determination of the Board in such proceeding is subject to any manner of judicial review. The absence from the statute of a provision for court review has sometimes been held not to foreclose review. *Stark v. Wickard*, 321 U. S. 288; *Federal Reserve Board v. Agnew*, 329 U. S. 441; *Administrative Procedure Act*, 5 U. S. C. §1009. Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. The allegation seems to be based on the fact that a different institution with which the management of the Long Beach institution was connected was merged by the authorities in a way that was highly objectionable to some of the shareholders and aroused concern of the public authorities. We find no explicit threat to merge the Long Beach institution and there is no such finding by the court below. The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or of evidence to sustain one, we accept the Government's assurance that merger will not

follow and, hence, we do not consider it necessary to discuss the legality of hypothetical mergers.

Since the judgment that has been rendered against the Conservator, who was duly served with process, must be reversed, we find it unnecessary to decide whether Fahey was indispensable party or was properly brought into the case by substituted service.

It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.

Our decision is that it was error in the court below to hold the section unconstitutional, to oust the Conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law. The judgment is

Reversed.

Mr. Justice Douglas concurs in the result.

Mr. Justice Rutledge concurs in the result and in the Court's opinion insofar as it rests upon the ground that the controlling statute, §5(d) of the Home Owners' Loan Act of 1933, is not unconstitutional.

Supreme Court of the United States.

No. 133, Misc.—October Term, 1946.

Ex Parte John H. Fahey and A. V. Ammann, Individually and Respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association.

[June 23, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

This petition by John H. Fahey, individually and as Federal Home Loan Bank Commissioner, and A. V. Ammann, individually and as Conservator for the Long Beach Federal Savings and Loan Association, invokes the original jurisdiction of this Court. They ask leave to file petition for a writ of “mandamus and/or prohibition and/or injunction” against Judge Peirson M. Hall of the United States District Court for the Southern District of California to vacate his order allowing fees to counsel in *Fahey v. Mallonee*, decided today, to prohibit any further allowance therein, and to enjoin any payments heretofore allowed.

While an appeal in the principal case was pending in this Court, application was made by various counsel for the plaintiffs and associated interests therein for allowance of fees aggregating some \$125,000. The District Court allowed counsel for plaintiffs \$50,000 as a partial payment on account of services, but withheld action on other applications. Certain costs and expenses of the plaintiffs in the amount of \$17,295.13 were also ordered reimbursed.

The petition involves serious questions of law and of fact. Whether, because of the pendency of the appeal and the stay order granted therein, the District Court had

power to entertain the application, whether before the final outcome of the case could be known an allowance was premature, whether the source of the fund on deposit with the court was so related to the services as to be subject to disbursement for their compensation, and whether one judge can make allowances in a case before a three-judge court, are, with other questions, much contested. We do not decide any question as to the merits.

Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

We find nothing in this case to warrant their use. An allowance of \$50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs.

The petition is

Denied.

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR
INTERIM PARTIAL ALLOWANCE ON ACCOUNT OF EXPENSES AND ATTORNEYS' FEES INCURRED BY THE PLAINTIFFS, THE SHAREHOLDERS PROTECTIVE COMMITTEE, PRIOR TO MARCH, 1947.

Submitted pursuant to direction in the opinion of the court announced April 7, 1947.

The motion of the plaintiffs, the Shareholder Members Committee, suing as representatives of the shareholder members of the Long Beach Federal Savings and Loan Association, for an interim allowance on account to reimburse the plaintiffs for their expenses and attorneys' fees incurred by them in their efforts for the protection and preservation of the funds and assets of the said association, from being merged, consolidated or commingled or otherwise lost or dissipated prior to March 1, 1947, having been previously filed with supporting exhibits and points and authorities by the plaintiffs on March 6, 1947, and this court having on said day made its order setting the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. in Court Room No. 3, located in the Federal Building at Los Angeles, California, as the time and place for the hearing of said motion, and the court on March 6, 1947, made its order that notice of the filing of said motion and of the time and place of the hearing thereof should be given by the plaintiffs, the Shareholders Members Protective Committee, to all parties who have appeared in the action by service of a copy of said order upon their respective solicitors or attorneys and that the Shareholders Members Protective Committee give public notice of the filing of said motion and of the time and place of the hearing thereof by publication of the said order of this

court, on or before the 12th day of March, 1947, in the following newspapers of general-circulation in the County of Los Angeles, State of California, to wit:—

- (1) The Long Beach Independent,
- (2) The Long Beach Press Telegram, and
- (3) The Los Angeles Daily Journal;

And the notices of the time and place of the hearing of said motion and the publication of the said order fixing the time and place of the said hearing, having been duly given pursuant to said order and by publication as aforesaid of said order, thus giving notice to the shareholder members of the said Long Beach Federal Savings and Loan Association and affidavit of publication of said order having been filed and the plaintiffs having served and filed the affidavits of John W. Preston, former Justice of the California Supreme Court, and L. R. Martineau, Jr., Esquire, setting forth their respective expert opinions of the reasonable value of the services rendered by counsel for the plaintiffs and the matter having duly and regularly come on for hearing on the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. and no person having appeared or filed any objection thereto, save and except the defendant A. V. Ammann, and the hearing of said motion having been duly and regularly continued upon the court's own motion to the 7th day of April, 1947, and the defendant A. V. Ammann having served and filed documents entitled "Resistance to Motions" and "Supplemental Points and Authorities in Support of Resistance to Motions," and the plaintiffs, the movants herein, having duly served and filed their Closing Statement and Points and Authorities within the time allowed by the court, and the resistor, the defendant Ammann, having filed no counter

affidavits denying or contravening the said affidavits or other factual documents filed by the plaintiffs, the matter came on regularly for hearing at 10:00 o'clock A. M., on the 7th day of April, 1947, and none of the shareholder members of the said Long Beach Federal Savings and Loan Association having made any objection thereto, and no other persons having made any objection to the granting of the said motion for an interim allowance on account of attorneys' fees and expenses, save and excepting only the resistor-defendants A. V. Ammann and John H. Fahey;

And there appearing Wyckoff Westover, Esquire, of the firm of Westover and Smith, attorneys for the plaintiffs; Ronald L. Walker, Esquire, Assistant United States Attorney, and Ray E. Dougherty, Esquire, Associate General Counsel of the Federal Home Loan Bank Administration, representing the resistor-defendants, A. V. Ammann and John H. Fahey; Charles K. Chapman, Esquire, appearing for the defendant and cross-complainant Long Beach Federal Savings and Loan Association; H. O. Wallace, Esquire, of the firm of Thomas and Wallace, appearing for the defendant and cross-claimant in interpleader, Title Service Company, a corporation, and Raymond Tremaine, Esquire, appearing as attorney for the defendant and cross-claimant in interpleader, Robert H. Wallis;

And the Court having offered the opportunity to any and all persons and parties in the court room to present further or additional testimony or objection and there being none offered and the resistor-defendants, A. V. Ammann and John H. Fahey, having presented no contravailing affidavits or oral or documentary evidence and the matter having been argued at length; the matter was submitted for decision.

The Court, being fully advised in the premises, now finds:

Findings of Fact.

(1) that proper notice of the hearing of said motion has been duly and regularly given, both by service on counsel and by publication, and

(2) that the Court has jurisdiction of the persons and subject matter involved, and

(3) that no objections have been made by any of the shareholder members whose money and funds are here involved, and

(4) that no objection has been made by any other person or persons, excepting only, the resistor-defendants A. V. Ammann and John H. Fahey, and

(5) that the shareholder members represented by the plaintiffs the Shareholder Members Protective Committee are the actual owners of the funds and assets of the Long Beach Federal Savings and Loan Association, which is a mutual association, and that they are legally and equitably entitled to use a small portion of their own funds for the protection and preservation of the corpus of the main fund which consists of the assets and funds of the Long Beach Federal Savings and Loan Association, and to prevent the merger, consolidation, or commingling of the Long Beach Federal Savings and Loan Association, and/or its assets, with any other association or institution and to preserve the said funds and assets of said association and to prevent further runs and to protect against their further dissipation by the resistor-defendants A. V. Ammann and John H. Fahey, and to aid and assist in obtaining the ultimate return of the Long Beach Federal

Savings and Loan Association and its assets, to the management of their, the shareholder members, own choice, and

(6) The plaintiffs herein, the Shareholder Members Protective Committee, are duly and regularly licensed and authorized to transact and carry on business as such in the State of California, by virtue of license No. L. A. A37621, file No. 80282 L. A., issued pursuant to Chapter 784, Statutes of 1937 of the State of California, and duly renewed on the 2nd day of January, 1947, by the Department of Investments, Division of Corporations, of the State of California, and

(7) That the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and memberships by commingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and

(8) That the filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, reorganizing or uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, as found by the undersigned from the

factual showing made before him on May 27, 1946, in a restraining order issued on said date, and

(9) That the terms of said restraining order issued on the 27th day of May, 1946, continued in full force and effect, and became a portion of the decree of the three-judge statutory court, made on September 30, 1946, which portion of said decree was not stayed in the stay order issued by the Honorable Justice Wiley Rutledge, Associate Justice of the United States Supreme Court, on October 1, 1946, and

(10) That in the six days from the date of seizure on May 20, 1946, of the said association's property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars (\$6,000,000.00) or at the rate of approximately one million dollars (\$1,000,000.00) a business day; that the filing of the within action on the 27th day of May, 1946, preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars (\$2,000,000.00) or at the rate of only approximately forty-eight thousand dollars (\$48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or completely destroyed by the withdrawal of shareholder members, and

(11) That by long established custom and usage in real estate transactions in Southern California, and particularly in the County of Los Angeles, State of California, titles are not acceptable to purchasers, nor can real property be encumbered in regular channels, except upon the

issuance of a policy of title insurance by a dependable, established title insurance company licensed under the laws of the State of California, and

(12) That loans upon real property in the State of California are not ordinarily secured by mortgages, but instead, trust deeds are used almost exclusively, by which the fee title to the property encumbered is deeded to a third party, usually a corporation, which acts as trustee with the power of foreclosure, and which trustee, upon the payment of the indebtedness, must execute a deed of reconveyance upon the request of the payee in the note, which payee is referred to as the beneficiary in the deed of trust, and

(13) That said association had loans on approximately eight thousand (8,000) parcels of land in the face amount of approximately twelve million dollars (\$12,000,000.00) of unpaid balances, and

(14) That the Trustee holding fee title to all of said parcels of property was and is Title Service Company, defendant, and cross-claimant in interpleader herein, and

(15) That at all times after the seizure by said Ammann of the property and records of said Association on May 20, 1946, the officials of said association refused to recognize the validity of said seizure and as a result thereof a controversy developed between said Ammann and said Association, which controversy made it impossible for said Title Service Company to determine whether or not after payment by the debtor, a reconveyance of the fee title should be made by said Title Service Company, as such trustee, upon demand of said Ammann, or on demand of said Association; that as a result of said controversy, the undersigned District Judge has allowed petitions in intervention by borrowers on notes secured by trust deeds, in

order to enable them to secure merchantable titles to the property, and to thus avoid demands upon them for double payment of said notes and to avoid the costs and delay of foreclosures, and

(16) That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconveyances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property, and

(17) That the value of the services of the firm of attorneys Westover & Smith and their associates, in representing the plaintiffs the Shareholder Members Protective Committee up to March 1, 1947, in their endeavor to protect and preserve the said Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately sixteen thousand (16,000) shareholder members, is substantially in excess of the sum of fifty thousand dollars (\$50,000.00), and

(18) That an interim allowance on account of such attorneys' fees and a partial satisfaction thereof can be made at this time without endangering the solvency of the said association; that there is on deposit now in the registry of this court funds belonging to the Long Beach Federal Savings and Loan Association in excess of eight hundred thousand dollars (\$800,000.00), from which an interim partial allowance on account of such attorneys' fees for services rendered prior to March 1, 1947, can be safely made; that a reasonable amount to be allowed at

this time on account of and in partial satisfaction of such attorneys' fees is the sum of Fifty Thousand Dollars (\$50,000.00), which is less than one-fifth of one percent of the assets of said association, to-wit: Twenty-six Million Dollars (\$26,000,000.00); and

(19) That the plaintiffs, the Shareholder Members Protective Committee, have incurred extraordinary expenses in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets, and properties, which prior to March 1, 1947, amounted to fifteen thousand five hundred thirty and $29/100$ (\$15,530.29) dollars, and that said plaintiffs, the firm of Westover & Smith and their associate Daniel W. O'Donoghue, Jr., have expended the sum of one thousand five hundred thirty-four and $77/100$ (\$1,534.77) dollars and two hundred thirty and $07/100$ (\$230.07) dollars, respectively, for the protection and preservation of the Long Beach Federal Savings and Loan Association, and its assets and properties, and that they are entitled to reimbursement therefor; and

(20) That there was no objection by said petitioners or any other party to the jurisdiction of respondent District Court at any time SINCE THE ISSUANCE OF THE STAY ORDER, issued by the Honorable Justice Wiley Rutledge on October 1, 1946, until motions were made by the resistor-defendants Fahey and Ammann to the United States Supreme Court for Writ of Mandamus and/or Prohibition and/or Injunction, which said Writ was denied by the United States Supreme Court, although there have from

time to time been allowed numerous interventions and deposits in Court, after motions and notices duly served upon all necessary parties. Said interventions have been allowed on behalf of borrowers who desired to pay off their indebtedness to enable them to secure clear title to their property.

Conclusions of Law.

From the foregoing findings of fact the Court now makes and renders its conclusions of law.

That from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with the Clerk of this Court the plaintiffs and their counsel are entitled to be paid the following amounts of money to the following persons, to-wit:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty and 29/100 (\$15,530.29) Dollars.

2. To the firm of Westover & Smith, attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947, in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four and 77/100 (\$1534.77) Dollars in-

curred during the same period of time and for the same purposes by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire, of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars (\$50,000.00)—on account.

Judgment.

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs and their counsel have Judgment for the following amounts of money payable to the following persons from the funds and assets of the Long Beach Federal Savings and Loan Association, and the Clerk of this Court is Hereby Ordered to pay from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with him in this action the said following amounts of money to the following persons:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan

Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty & 29/100 (\$15,530.29) Dollars.

2. To the firm of Westover & Smith, attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947, in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four & 77/100 (\$1534.77) Dollars incurred during the same period of time and for the same purposes by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire, of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars (\$50,000.00)—on account.

Dated at Los Angeles this 2nd day of September, 1947.

/s/ Peirson M. Hall,
PEIRSON M. HALL,

Judge.

[TITLE OF COURT AND CAUSE.]

ORDER DENYING APPLICATION FOR REVIEW BY THREE
JUDGE COURT PURSUANT TO TITLE 28, SECTION 792,
U. S. C. A.

On this 10th day of September, 1947, at the hour of 10:00 o'clock a. m., before the undersigned United States District Judge, and pursuant to notice theretofore given in accordance with the terms of an order of court, the application of the defendant A. V. Ammann, as conservator of the Long Beach Federal Savings and Loan Association for review by the three judge court, heretofore convened in the above-entitled action and "Findings of Fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the shareholders protective committee, prior to March, 1947," made and entered in the above-entitled matter on the 2nd day of September, 1947, and for a stay of execution thereon in connection with and pending such review, both having come on for hearing on the above date and hour; and Westover & Smith appearing as attorneys for said plaintiffs, H. O. Wallace appearing as attorney for cross-claimant in interpleader, Title Service Company, Charles K. Chapman appearing as attorney for Long Beach Federal Savings and Loan Association, defendant, third party plaintiff and cross-claimant, Raymond Tremaine for cross-claimant in interpleader and defendant Robert H. Wallis, and James M. Carter, United States Attorney, and Ronald R. Walker, Assistant United States Attorney, appearing as attorneys

for said defendant A. V. Ammann, as well as Ray E. Dougherty, associate general counsel Home Loan Board, appearing specially; and

It appearing to the Court that the three judge statutory court, which was convened and sat in this matter on July 15 and 16, 1946, under Title 28, Section 380(a), was limited to the determination as whether or not an interlocutory or permanent injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part an act of Congress, to wit, portions of the Home Owners Loan Act of 1933 as amended, upon the ground that such act or any part thereof was repugnant to the Constitution of the United States; and

It further appearing that said Court rendered the decision granting the injunction prayed for in the said matter on the ground that Section 5(d) of said Act was repugnant to the Constitution of the United States, and made and entered its judgment accordingly on the 30th day of September, 1946; and

It further appearing that thereafter an appeal was taken from said judgment of the said three judge court directly to the Supreme Court of the United States which, on June 23, 1947, rendered its opinion holding said Section 5(d) not to be repugnant to the Constitution of the United States and ordering the judgment of said three judge court reversed; and

It further appearing pursuant to said opinion that the mandate in compliance therewith was spread in the above-entitled court on the 19th day of August, 1947; and

It further appearing that the power of said three judge court was limited to a consideration of the question of constitutionality and that upon the reversal of the judgment of said three judge court by the Supreme Court and spreading of the mandate on the 19th day of August, 1947, as aforesaid terminated any and all power and jurisdiction of said three judge court; and

It further appearing that the final hearing by the said three judge or statutory court was had on July 15 and 16, 1947; and

It further appearing that the hearing upon which the said findings of fact, etc., hereinabove referred to were made, was held by the undersigned on April 7, 1947; and

It further appearing that subsequent thereto and, to wit, on April 12, 1947, the undersigned received telegraphic notice that the Supreme Court, on a petition theretofore filed by and on behalf of John H. Fahey and A. C. Ammann, prohibited, enjoined and restrained the undersigned from taking any further proceedings in connection with the petitions for allowance of attorneys' fees and expenses theretofore filed on behalf of various parties, including the said Westover & Smith and the said plaintiffs, which telegraphic notice was subsequently followed by formal notification from the clerk of the Supreme Court to the undersigned judge; and

It further appearing that pursuant to said order of prohibition, injunction and restraint, the undersigned judge took no action in connection with the matters covered by

said order of prohibition, injunction and restraint until after the decision of the Supreme Court on the 23rd day of June, 1947, denying said petition of said John H. Fahey and A. V. Ammann for a permanent order of prohibition, enjoinder and restraint and until after the spreading and filing of the mandate from the Supreme Court hereinabove referred to on August 19, 1947.

From the foregoing, it is hereby concluded by the undersigned that on the 2nd day of September, 1947, on the date of signing, making and entering the said findings of fact, etc., the said three judge court was not in existence and is not now, and that the final hearing as contemplated by Section 792 of Title 28 was had on July 15 and 16, 1946.

Now, therefore, it is hereby ordered that said application for review to the three judge court be, and it is hereby denied; and it is further hereby ordered that inasmuch as the application for stay of execution was requested only in the event the application for review to said three judge court was granted, that said stay of execution falls with the denial of the application for review to the three judge court.

Dated: At Los Angeles, California, this 10th day of September, 1947.

/s/ PEIRSON M. HALL,
PEIRSON M. HALL,

Judge of the District Court United States.

[TITLE OF COURT AND CAUSE.]

AMENDED NOTICE OF APPEAL FROM ORDER FOR INTERIM
PARTIAL ALLOWANCE ON ACCOUNT OF EXPENSES
AND ATTORNEYS' FEES INCURRED BY THE PLAINTIFF,
SHAREHOLDER MEMBERS PROTECTIVE COMMITTEE,
PRIOR TO MARCH, 1947.

Notice is hereby given that the defendant A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association, by the direction of the Department of Justice of the United States of America acting through the Solicitor General, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain Order made and entered on September 2, 1947, allowing attorneys' fees and expenses in the total amount of \$67,065.06 to be paid as follows: To the plaintiff, the Shareholder Members Protective Committee, \$15,530.29 for costs and expenses; to Westover & Smith for costs and expenses, \$1,534.77; to Westover & Smith as interim partial allowance on account of attorneys' fees, \$50,000, and from the further order of the court made and entered on September 10, 1947, denying the application for a review of said order of September 2, 1947, pursuant to Title 28, Section 792, U. S. C. A., by the three judge court heretofore convened in the above entitled action.

Dated this 11th day of September, 1947.

JAMES M. CARTER,
United States Attorney.

RONALD WALKER,
Assistant U. S. Attorney.

[TITLE OF COURT AND CAUSE.]

AFFIDAVIT OF PAUL MALLONEE IN OPPOSITION TO
APPLICATION FOR STAY OF EXECUTION RE: ORDER
FOR FEES AND EXPENSES.

State of California, County of Los Angeles—ss.

Paul Mallonee, being first duly sworn, deposes and says:

I.

Your affiant is chairmen of the Shareholders Protective Committee suing as representatives of the class of 16 thousand shareholder depositors whose deposits totaled 22½ million dollars in the Long Beach Federal Savings and Loan Association, the seizure of which association by certain defendants is the cause of this litigation. That said shareholders committee of which affiant is chairman holds the proxies of the majority of the said 16 thousand shareholders in said seized Long Beach Federal Savings and Loan Association and is acting on behalf of and by the authority of the said majority of said shareholders. The committee is authorized by the California Corporation Commissioner so to act, under permit No. L. A. A37621.

II.

That in March, 1946 the defendants without notice, cause or hearing seized, merged and dissolved the 46 million dollar Federal Home Loan Bank of Los Angeles. That defendant Long Beach Federal Savings and Loan Association was a stockholder in the seized Los Angeles Bank and had millions of dollars of its government bonds in the custody of said seized bank. That the Long Beach Association resisted the confiscation of the Los Angeles

Bank and because of such resistance, on May 20, 1946, also without notice, hearing or trial, the Long Beach Federal Savings and Loan Association, which then had 16 thousand shareholder depositors, 8 thousand borrower members, and 26 million dollars in assets was also seized by the same defendants. That at the time of their seizures the institutions were completely solvent, both had surpluses of over one million three hundred thousand dollars each and the Long Beach Association had grown in 12 years from \$7,500 to \$26,000,000.00. That in the last month before it was seized the Long Beach Association had gained in new deposits approximately \$600,000. That it was so completely solvent that when seized, said defendants met from the assets of the seized association a run of approximately 10 million dollars which developed in the first few weeks after its seizure.

That a Congressional Investigation of the seizure was made and the Congressional Committee recommended that both the Los Angeles Bank and the Long Beach Association be restored to their rightful management and that the defendants remove themselves from the possession they had thus seized.

That this action was brought in the United States District Court for the Southern District of California and resulted in a finding by the three Honorable Judges that the law under which said defendants had seized the Long Beach Association was unconstitutional. This judgment was appealed by said seizing defendants to the United States Supreme Court. While the appeal to the United States Supreme Court was pending, plaintiffs made this application to the trial court for a temporary, partial allowance on account of attorneys fees and expenses in-

curred in bringing and maintaining this action in the Federal Courts for the preservation and restoration of their \$26,000,000 in property. Only the defendants Fahey and Ammann resisted the allowance of fees and expenses to those whose property they had seized. None of those who owned the property objected. The trial Court after due notice, full hearing, and submission of many affidavits and numerous points and authorities made the allowance which defendants Fahey and Ammann are now seeking to delay by this stay.

Defendants Fahey and Ammann made an application to the Supreme Court of the United States for a special writ of prohibition, mandamus and/or injunction seeking to prevent the trial judge, Honorable Peirson M. Hall, from signing the order allowing fees and expenses. Pending the action in the Supreme Court, Judge Hall, out of respect for the Supreme Court, would not sign the order and took no further steps in the fee application matter. The Supreme Court of the United States refused the writ applied for and said in part: "An allowance of \$50,000.00 will hardly destroy a \$26,000,000.00 association during the time it would take to prosecute an appeal . . . The petition is denied."

The trial court found that the amount allowed was less than 1/5 of one per cent of the assets of the association.

III.

For 15 months plaintiffs have been fighting for the restoration to the rightful owners of the seized assets of this association. This fight has thus far gone through a Congressional Investigation, a hearing before three Federal Judges at Los Angeles, a Supreme Court appeal

taken by the defendants Fahey and Ammann which resulted in the action being returned for trial on the facts and now after all of this delay, defendants Fahey and Ammann are yet seeking to prevent payment to plaintiffs of the funds necessary to prosecute the litigation. Their motive in such resistance is plain. If they cannot win by the justice of their cause they hope at least to win by the exhaustion of plaintiffs and their counsel. Litigation of this magnitude, involving these amounts, is exhausting in the time and effort consumed and defendants Fahey and Ammann hope that by withholding, impeding and delaying the very life blood of litigation, the money necessary to finance the proper presentation of plaintiffs' cause, they will thereby win, not by the merit or justice or right of their own case but by plaintiffs being unable to any further prosecute the litigation because of exhaustion of plaintiffs' funds.

IV.

Pursuant to the order of the trial judge fixing the time and place of hearing and the notice to be given of such hearing on the application for fees and expenses, notice was published in papers published in the Cities of Long Beach and Los Angeles where most of the depositors of said association reside. NOT ONE DEPOSITOR HAS OBJECTED TO THE PAYMENT OF THE FEES AND EXPENSES. The only objection has come from the defendants Fahey and Ammann against whom the fee will be used to cause them to submit the merits and justice of their seizure to an impartial federal trial court. The money allowed in the fee application does not belong to Fahey nor Ammann.

V.

This litigation has already continued for 15 months, has gone to the United States Supreme Court and back again and by order of the United States Supreme Court will probably be launched into a lengthy factual trial which will consume many months in the trial court and which will undoubtedly be appealed by the defendants Fahey and Ammann if decided against them.

Fahey and Ammann will not be deprived of one cent by this allowance. They have seized money which they admit belongs to others. Those whose money it is not only make no objections but urge and ask the Court to let them use part of their own money. Fahey and Ammann resist on behalf of whom? Certainly not those to whom the money belongs. These Shareholder owners for whose protection Fahey and Ammann claim to be acting, disavow what Fahey and Ammann have done. They not only want this temporary allowance, they want their whole property back! Fahey and Ammann, while withholding the whole property, seek also by these delays to prevent the use of even a tiny part of the seized property to present to the courts the justice or injustice of their seizure. The assembling of evidence, the taking of depositions scattered across the United States involves thousands of dollars and months of time. The resistance by Fahey and Ammann to plaintiffs use of their own money comes with very poor grace from those who are using plaintiffs money in payment of their own salaries, in payment of their deputies, examiners, and the legal staff of the Federal Home Loan Bank Board.

VI.

The very appeal about to be taken by defendants Fahey and Ammann on this fee order will require tremendous amounts of time and money on the part of plaintiffs to protect even this fee and expense allowance. A printing of the record will be necessary, briefs must be prepared and much labor expended. Already because of defendants Fahey and Ammann's appeal to the Supreme Court of the United States plaintiffs have been compelled to pay the expense of printing the record, printing of briefs and costs in the amounts of many thousands of dollars. In addition, it has been necessary to finance numerous trips to Washington, D. C., some 3,000 miles from the offices of the Association, all occurring since the allowance and not covered thereby.

Wherefore, affiant prays that the money allowed plaintiffs by the trial court (which allowance defendants unsuccessfully attacked in the United States Supreme Court) be paid forthwith that it may be utilized immediately for the purposes for which it was allowed—the protection of the rights of the 16,000 shareholder depositors, and the 8000 borrowers, whose \$26,000,000 in assets, was seized by these defendants, without notice, hearing, or trial; and that the motion for stay of execution be denied. Further affiant sayeth naught.

/s/ PAUL MALLONEE.

Subscribed and sworn to before me this 9th day of September, 1947.

MARGARET O. SHALLIS,

*Notary Public in and for the County of Los Angeles,
State of California.*

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION
TO THE GRANTING OF A STAY OF EXECUTION OF THE
ORDER FOR INTERIM PARTIAL ALLOWANCE OF FEES
AND EXPENSES.

POINT I.

It rests within the discretion of this Honorable Court as to whether or not a stay of execution of the order for partial interim allowance of fees and expenses should be granted. This Court is in a position to judge best whether or not the balance of convenience requires the immediate payment of the money allowed.

In *Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission*, 67 L. Ed. 217, 260 U. S. 212 (1922), the Supreme Court of the United States, in considering an application for stay of execution said:

“But the Court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits and therefore is familiar with the record. Records in cases are often very voluminous. Such is the record in this case. Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record, and can pass on the same issue without additional labor. That was the course taken by this court in *Southern R. Co. v. Watts*, 66 L. ed. 1071; 259 U. S. 576, U. S. Supreme Court (1922). A similar order will be made here. . . .”

The very purpose of an interim allowance is to make available money to present the case to the courts for de-

cision. The quality and nature of the appeal for justice will be limited by the availability of finances for its presentation. The stay of the order for money will weaken the cry for relief of the distressed whose property has been seized.

The granting or denying of a stay in this matter will affect the strength of the case presented against defendants Fahey and Ammann. This is why they have delayed payment by seeking writs in the Supreme Court and now seek further delay in this court to prevent the use against themselves of the money they seized which belongs to the plaintiffs.

This discretion as to a stay is primarily reposed in the trial court as was set forth in the case of:

Fidelity Deposit Co. of Maryland v. Davies, Circuit Court of Appeals, 4th Circuit (1942), 127 F. (2d) 780,

wherein the court said: "Whether he (District Judge) shall grant the stay or not is a matter resting in his sound discretion under all the circumstances of the case. *Magnum Import Co. v. Coty*, 262 U. S. 159, 43 S. Ct. 531, 67 L. ed. 922; *Blue Gem Dresses v. Fashion Originators Guild*, 2 Cir., 116 F. 2d 142; *Orth v. Steger*, D. C., 258 F. 625; *Williams v. Keyes*, 135 Fla. 719, 186 So. 250." (Interpolation ours.)

Therefore the stay of execution is one for the Trial Court to determine for itself in the first instance. Such determination should not be merely for the purpose of permitting the appellate court to exercise a duty resting primarily upon the Trial Court.

Further as is shown in the case of

Magnum Import Company v. De Spoturno, etc.,
67 L. Ed. 922; 262 U. S. 160 (1923),

the application must be made in the first instance to the trial or lower court and when determined by them (unless discretion is abused) will not be reversed by the appellate court. In this case, the Supreme Court said:

“When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the circuit court of appeals, a heavy burden rests on the applicant. The petition should in the first instance, be made to the circuit court of appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari; and, second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no disrespect to this court for the circuit court of appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us . . . This is a matter, however, wholly within its discretion. If it refuses, this court requires an extraordinary showing before it will grant a stay of the decree below, pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and decided balance of convenience before it will grant such stay.

. . . Coming now, to the circumstances presented on the inquiry before us, we find nothing to justify our granting the motion. It is clear that the circuit court of appeals gave full consideration to a similar motion, and, with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter.” (Emphasis added.)

The law is thereby settled that the granting or denying of the stay of execution rests primarily with the Trial Court and that the application for such must be made to them first and not initially in the appellate court.

Further, the trial court’s determination of the matter will, (unless extreme circumstances be shown) be conclusive on appeal to the appellate court.

POINT II.

The discretion of the trial court can be exercised as a court of equity by making allowance for attorney fees and other expenses pending the litigation payable out of the common fund.

Trustees v. Greenough, 105 U. S. 527 at 538.

The severability of the allowance of expenses and attorney fees from a decision on the merits of the issues at any stage in the proceedings was recognized by the Supreme Court of the United States in the case of

Sprague v. Ticonic National Bank, 307 U. S. 161
at page 168 (1938).

Expenses and fees may be allowed from a common fund in the discretion of the trial court even where the litigation is unsuccessful. In the case of

Eggert v. Pacific States Savings and Loan Co.,
53 Cal. App. (2d) 552, 127 Pac. 999,

in allowing attorney fees to O'Melveny and Myers in the sum of \$36,270.00, although they were unsuccessful in obtaining for the Pacific States Savings and Loan Company, whom they represented, any participation in the common fund, the Court followed the principle that a beneficiary may litigate, defend and protect a common fund and may be awarded counsel fees out of the trust assets if the defense is conducted in good faith and on reasonable grounds. (Citing Trustees v. Greenough, supra, and other cases, including Anderson v. Great Republic Life Insurance Co., 41 Cal. App. (2d) 181.) "A different rule does not apply, even though the beneficiary is unsuccessful in the litigation. Dingwall v. Seymour, 91 Cal. App. 483 at 513 (267 Pac. 327)."

The California Supreme Court followed a similar rule in the case of

Winslow v. Harold G. Ferfuson Company, 25
Cal. (2d) 274 (1944),

wherein they approved the interim allowance of expenses and counsel fees to litigants who were endeavoring to preserve and protect the common fund even before termination of the litigation.

POINT III.

The allowance of fees and expenses does not involve a distribution, or determination of the right of possession of the corpus of the common fund, which is the subject of this litigation.

In an effort to prevent the payment of the fees and expenses, Fahey and Ammann, in their petition to the Supreme Court for a writ of mandamus, and/or prohibition, and/or injunction, urged that the Association would be harmed by such payment. The Supreme Court held otherwise and stated:

“An allowance of \$50,000.00 will hardly destroy a \$26,000,000.00 association during the time it would take to prosecute an appeal.”

Ex parte Fahey, No. 133 Misc. Oct. Term, 1946,
Supreme Court of the United States.

The amount so awarded represents approximately 1/5th of 1% of the total assets of the seized institution.

The denial of the requested Stay of Execution and immediate payment of the amounts allowed is urgently required to prevent manifest injustice.

Respectfully submitted,

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

' WYCKOFF WESTOVER,

Attorneys for Plaintiffs.

CONCURRENCE AND JOINDER

The undersigned concur and join in the foregoing.

CHARLES K. CHAPMAN,

/s/ CHARLES K. CHAPMAN,

CHARLES K. CHAPMAN,

*Attorney for Long Beach Federal Savings and Loan
Association.*

THOMAS & WALLACE,

By /s/ H. O. WALLACE,

H. O. WALLACE,

Attorneys for Title Service Company.

Received copy of the within document this 10th day of September, 1947. James M. Carter, U. S. Attorney; by Ronald Walker, Ass't U. S. Attorney, Attorney for Defendants John H. Fahey and A. V. Ammann. O'Melveny and Myers, by Pierce Works; Richard Fitzpatrick, Attorneys for Defendants Federal Home Loan Bank of Los Angeles. Hoffman and Bishop, Attorneys for Defendants Federal Home Loan Bank of San Francisco. Raymond Tremaine, Attorney for Defendant Robert H. Wallis.

[TITLE OF COURT AND CAUSE.]

ORDER DENYING APPLICATION FOR STAY OF EXECUTION
OF ORDER ALLOWING ATTORNEYS' FEES AND EXPENSES.

On the 10th day of September, 1947, before the undersigned United States District Judge, an oral application having been made in open Court by James M. Carter, United States Attorney, by Ronald Walker, Assistant United States Attorney, and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board, for an Order staying execution of the Order of this Court, dated September 2, 1947, allowing interim partial fees and expenses incurred prior to March 1, 1947, to the plaintiffs, the Shareholder Members Protective Committee, and to Westover and Smith, their attorneys, said application having been made in the presence of Wyckoff Westover of Westover and Smith, attorneys for the plaintiffs; Charles K. Chapman, attorney for the defendant, cross-claimant and third party plaintiff, Long Beach Federal Savings and Loan Association; Raymond Tremaine, attorney for defendant and cross-claimant Robert H. Wallis; H. O. Wallace of Thomas and Wallace, attorneys for defendant and cross-claimant Title Service Company; John Whyte of O'Melveny and Myers, attorneys for defendant and cross-claimant Federal Home Loan Bank of Los Angeles; and

Said application for such stay of execution having been made without prior notice of motion, without supporting points and authorities, without supporting affidavits or other factual showing of any nature whatsoever; and

There having been filed on behalf of the plaintiffs and appellees the Shareholder Members Protective Committee,

an affidavit and points and authorities opposing the granting of a stay of execution of said Order, allowing interim partial fees and expenses; and

The matter having been argued by counsel for such parties as desired to be heard, and the court having considered the affidavit, points and authorities, presented by the plaintiffs and appellees, having considered the records and files in the entire proceedings, and the Court being fully advised in the premises and it appearing to the Court:

(1) That "The Federal Home Loan Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession." (Fahey v. Mallonee, United States Supreme Court opinion, Case No. 687, October Term, 1946.) That this litigation was commenced on May 27, 1946, by the plaintiffs, subsequently formed into and acting herein as the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, following said seizure by the defendants John H. Fahey as the Federal Home Loan Bank Commissioner and his appointee, A. V. Ammann, as the conservator for said Association, said Association having been at the date of seizure, May 20, 1946, a solvent institution having assets of approximately Twenty Six Million Dollars (\$26,000,000.00), which said seizure followed by approximately two months the seizure of the solvent Forty Six Million Dollar (\$46,000,000.00) Federal Home Loan Bank of Los Angeles by the defendant John H. Fahey, in which Federal Home Loan Bank said Association then had on deposit for safe-keeping government bonds alleged to exceed Five Million Dollars (\$5,000,000.00) in value and in which Federal Home Loan Bank said association owned stock alleged to be in excess of Three Hundred Thousand Dollars (\$300,000.00); and

(2) It further appearing that the plaintiffs were licensed by the State of California to act as such Shareholders' Committee under License No. LA-A 37621 issued pursuant to Chapter 784, Statutes of 1937, of the State of California, by the Department of Investments, Division of Corporations; and that said Shareholders' Committee have been authorized in writing, by more than a majority, to wit: approximately fifty-six percent (56%) of the shareholder-members of said Long Beach Federal Savings and Loan Association to represent them; and that Westover and Smith, as the attorneys for the plaintiffs, therefore represent more than a majority of the shareholders in said Association; and

(3) It further appearing that considerable additional litigation was carried on by the plaintiffs in conjunction with litigation herein referred to, including the representation of said Shareholders in numerous matters of Interpleader and Interventions during the course of which there has been deposited in the registry of this Court in excess of One Million Two Hundred Thousand Dollars (\$1,200,000.00) in cash; and

(4) It further appearing that no objection of any sort whatsoever has been raised to the allowance of said fee and expense money by any shareholder or depositor-member, or any other private person, entity or corporation ultimately concerned in ownership interest of the assets and funds of said association. That the only objection made to said allowance of said money and the only application for Stay of Execution of said allowance has come from appellant Ammann and the other seizing defendant, after notice as required by the Federal Rules of Civil Procedure and after wide public notice of the hearing on said application having been given on special order of

court, by publication in two daily newspapers of the City of Long Beach, California, the city wherein said Association is located, and in one of the daily newspapers of the City of Los Angeles, California, the city wherein said hearing was had, and after the consideration of numerous and lengthy affidavits by lay persons and expert witnesses, and no contravailing factual matters having been presented in opposition; and

(5) It further appearing that the money from which said interim partial fees and expenses would be paid is money on deposit in the registry of this Court; and

(6) It further appearing that after said hearing and prior to the making of any formal order thereon, the defendants John H. Fahey and A. V. Ammann did petition the Supreme Court of the United States for a Writ of Prohibition and/or Mandamus and/or Injunction to prohibit and restrain the undersigned Judge from further acting on said application for fees and expenses; and

(7) It further appearing that the Supreme Court of the United States did in an opinion filed on June 23, 1947, deny said petition for a Writ of Prohibition and/or Mandamus and/or Injunction; and

(8) It further appearing that this Court in deference to the Supreme Court of the United States, having desisted from any further proceedings until after said decision by the Supreme Court, did on September 2, 1947, make and enter its order allowing a partial interim allowance on account of attorneys' fees to the firm of Westover and Smith, plaintiffs' attorneys, in the sum of Fifty Thousand Dollars (\$50,000.00), and make its further order for the payment to said law firm of the sum of One Thousand Five Hundred Thirty Four and 77/100 (\$1534.77) Dollars, and order the payment to the plaintiffs of the

sum of Fifteen Thousand Five Hundred Thirty and 29/100 (\$15,530.29) Dollars, as and for expenses incurred by them, all of such allowances relating to services and expenses incurred prior to the 1st day of March, 1947; and that a true and correct copy of said order of September 2, 1947, is for convenience attached hereto, marked "Exhibit A,"¹ and the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(9) It further appearing that the defendant A. V. Ammann did on the 8th day of September, 1947, file with this Court his Notice of Motion for a Review by said statutory three-judge court of said order and for a stay of execution thereof pending such review; and

(10) It further appearing that said Motion for Review came on for hearing on the 10th day of September, 1947, and having been denied and the application for a stay of execution thereon having been requested only in the event the application for review by said three-judge court be granted, said stay of execution fell with the denial of the application for review; and that a formal order was made and signed by the undersigned on September 10, 1947, entitled "Order Denying Application for Review by Three

¹ There were attached to this order denying application for stay of execution of order allowing attorneys' fees and expenses two Exhibits; Exhibit A being findings of fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the Shareholders Protective Committee, prior to March, 1947; and Exhibit B being Order denying application for review by Three-Judge Court pursuant to Title 28, Section 792, U. S. C. A. Inasmuch as these exhibits are heretofore printed in the appendix at pages 49 and 61, respectively, we are not reproducing them in connection with the original order denying application for stay of execution.

court, by publication in two daily newspapers of the City of Long Beach, California, the city wherein said Association is located, and in one of the daily newspapers of the City of Los Angeles, California, the city wherein said hearing was had, and after the consideration of numerous and lengthy affidavits by lay persons and expert witnesses, and no contravailing factual matters having been presented in opposition; and

(5) It further appearing that the money from which said interim partial fees and expenses would be paid is money on deposit in the registry of this Court; and

(6) It further appearing that after said hearing and prior to the making of any formal order thereon, the defendants John H. Fahey and A. V. Ammann did petition the Supreme Court of the United States for a Writ of Prohibition and/or Mandamus and/or Injunction to prohibit and restrain the undersigned Judge from further acting on said application for fees and expenses; and

(7) It further appearing that the Supreme Court of the United States did in an opinion filed on June 23, 1947, deny said petition for a Writ of Prohibition and/or Mandamus and/or Injunction; and

(8) It further appearing that this Court in deference to the Supreme Court of the United States, having desisted from any further proceedings until after said decision by the Supreme Court, did on September 2, 1947, make and enter its order allowing a partial interim allowance on account of attorneys' fees to the firm of Westover and Smith, plaintiffs' attorneys, in the sum of Fifty Thousand Dollars (\$50,000.00), and make its further order for the payment to said law firm of the sum of One Thousand Five Hundred Thirty Four and 77/100 (\$1534.77) Dollars, and order the payment to the plaintiffs of the

sum of Fifteen Thousand Five Hundred Thirty and 29/100 (\$15,530.29) Dollars, as and for expenses incurred by them, all of such allowances relating to services and expenses incurred prior to the 1st day of March, 1947; and that a true and correct copy of said order of September 2, 1947, is for convenience attached hereto, marked "Exhibit A,"¹ and the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(9) It further appearing that the defendant A. V. Ammann did on the 8th day of September, 1947, file with this Court his Notice of Motion for a Review by said statutory three-judge court of said order and for a stay of execution thereof pending such review; and

(10) It further appearing that said Motion for Review came on for hearing on the 10th day of September, 1947, and having been denied and the application for a stay of execution thereon having been requested only in the event the application for review by said three-judge court be granted, said stay of execution fell with the denial of the application for review; and that a formal order was made and signed by the undersigned on September 10, 1947, entitled "Order Denying Application for Review by Three

¹ There were attached to this order denying application for stay of execution of order allowing attorneys' fees and expenses two Exhibits; Exhibit A being findings of fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the Shareholders Protective Committee, prior to March, 1947; and Exhibit B being Order denying application for review by Three-Judge Court pursuant to Title 28, Section 792, U. S. C. A. Inasmuch as these exhibits are heretofore printed in the appendix at pages 49 and 61, respectively, we are not reproducing them in connection with the original order denying application for stay of execution.

Judge Court Pursuant to Title 28, Section 792, U. S. C. A.," a true and correct copy of which is for convenience attached hereto, marker "Exhibit B," the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(11) It further appearing that the bulk of the litigation thus far has had to do with some of the legal and preliminary phases only thereof and that the principal factual and legal matters which may arise in or in conjunction therewith remain to be heard, and there is also to be determined the various issues raised by the respective cross-claims and interventions, and that the litigation is presently continuing, and unless the fees and expenses heretofore allowed be paid, the plaintiffs may be deprived of their rights to pursue the litigation to an ultimate judgment on the merits; and

(12) It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and the incurring of enormous expense for the preparation of pleadings (which in this case have been voluminous), multitudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently appears that the within action was commenced and is maintained by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the

whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses; and

(13) It further appearing that as found by the Supreme Court of the United States in their opinion filed on June 23, 1947 (*Ex parte* Fahey, 133 Miscellaneous, October Term, 1946), "an allowance of Fifty Thousand Dollars (\$50,000.00) will hardly destroy a Twenty Six Million Dollar (\$26,000,000.00) Association during the time it would take to prosecute an appeal." The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs"; and said Court therein denied said petition; and

(14) It further appearing that on September 10, 1947, the appellant A. V. Ammann filed a notice of appeal wherein the order and judgment of this Court for an interim partial allowance of attorneys' fees and expenses to March 1, 1947, for the plaintiffs, was appealed to the Ninth Circuit Court of Appeals and immediately thereafter the Motion on which this order is based was presented to the Court.

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

First: The application for stay of execution as to that part of the order and judgment allowing the sum of Fifteen Thousand Five Hundred Thirty and 29/100 (\$15,-

530.29) Dollars, as expenses incurred for the period up to March 1st, 1947, by the plaintiffs, the Shareholder Members Protective Committee, is unconditionally denied;

Second: The application for stay of execution as to that part of the order and judgment allowing the sum of One Thousand Five Hundred Thirty Four and 77/100 (\$1534.77) Dollars as expenses incurred for the period up to March 1, 1947, by the firm of Westover and Smith, attorneys for the plaintiffs, is unconditionally denied;

Third: The application for stay of execution as to that part of the order allowing the sum of Fifty Thousand (\$50,000.00) Dollars as an interim partial allowance on account of attorneys' fees for services rendered prior to March 1, 1947, to the firm of Westover and Smith, as attorneys for the plaintiffs, Shareholder Members Protective Committee, is denied upon condition that the said firm of Westover and Smith file with the Clerk of this Court a Surety Bond in a form approved by this Court, conditioned that the said firm will obey any final judgment as to the disposition of the said sum of Fifty Thousand Dollars (\$50,000.00), paid pursuant to the order of this Court, and upon the filing of said bond as approved, the Clerk of this Court is ordered and directed to pay to the firm of Westover and Smith from the funds on deposit in the registry of this Court the sum of Fifty Thousand Dollars (\$50,000.00).

Fourth: Pursuant to stipulations entered into in open Court, and entered by the Clerk in the minutes of this Court, by and between James M. Carter, United States

Attorney, by Ronald Walker, Assistant United States Attorney, and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board, on the one hand, and Wyckoff Westover, Esquire, of the firm of Westover and Smith, on the other hand;

It Is Hereby Ordered that the Clerk of said Court make such payments to the said firm of Westover and Smith of the said sum of Fifty Thousand Dollars (\$50,000.00) and to plaintiffs and said attorneys of the said sum of Seventeen Thousand Sixty-five and 06/100 Dollars (\$17,-065.06), only upon the occurring of either of the following events:

1. The expiration of 10 days from the date of the signature of this Order without the filing with the Clerk of this Court of notice that appellant has applied to the Ninth Circuit Court of Appeals, or to a Justice thereof, for a stay of execution of said order; or

2. If such notice be so filed within said 10 days, then the filing with the Clerk of this Court of a notice from the Ninth Circuit Court of Appeals, or from a Justice thereof, that application for a stay of execution made to said tribunal, or a Justice thereof, by said appellant, has been denied.

Dated at Los Angeles, California, this 30th day of September, 1947.

/s/ Peirson M. Hall,
PEIRSON M. HALL,

Judge.

Approved as to form:

CHARLES K. CHAPMAN,
*Attorney for Long Beach Federal
Savings and Loan Association.*

THOMAS AND WALLACE,
By -----
H. O. WALLACE,
Attorneys for Title Service Company.

RAYMOND TREMAINE,
Attorney for Robert H. Wallis.

O'MELVENY AND MYERS,
By -----
PIERCE WORKS,

RICHARD FITZPATRICK,
*Attorneys for Federal Home
Loan Bank of Los Angeles.*

Service of the foregoing order acknowledged this.....
day of September, 1947, at.....P. M.
Assistant U. S. Attorney, attorney for defendant Ammann.

No. 11753

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as James M. Fly,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

JAN 30 1948

PAUL P. O'BRIEN, CLERK

No. 11753

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as James M. Fly,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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JAMES M. CARTER

United States Attorney

ERNEST A. TOLIN

HOMER H. BELL

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building
Los Angeles 12, Calif. [1*]

In the District Court of the United States
in and for the Southern District of California
Central Division

February, 1946, Term
No. 19342

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES M. MOSCA, otherwise known as James M. Fly,
Defendant.

INDICTMENT

Title 18, U. S. C., Sec. 80—Making and Using, and Causing to Be Made and Used a False Bill, Account, Claim and Certificate—Sugar Ration Check—in a Matter Within the Jurisdiction of an Agency of the United States.

Title 50, U. S. C., App., Sec. 633; Gen. Ration Ord. 8, Secs. 2.6 and 2.9; Illegal Use and Transfer of Ration Documents.

The grand jury charges:

COUNT ONE

[U. S. C., Title 18, Sec. 80]

On or about November 11, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 10,000 pounds of sugar, drawn on the Santa Monica

and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [2]

COUNT TWO

[U. S. C., Title 18, Sec. 80]

On or about November 22, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 1,500 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the

Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [3]

COUNT THREE

[U. S. C., Title 18, Sec. 80]

On or about November 23, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 1,600 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [4]

COUNT FOUR

[U. S. C., Title 18, Sec. 80]

On or about November 29, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used, a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 3,500 pounds of sugar, drawn on the Santa Monica and

Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [5]

COUNT FIVE

[U. S. C., Title 18, Sec. 80]

On or about November 19, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 10,000 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the

Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [6]

COUNT SIX

[U. S. C., Title 18, Sec. 80]

On or about November 22, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 10,000 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [7]

COUNT SEVEN

[U. S. C., Title 18, Sec. 80]

On or about October 22, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 5,000 pounds of sugar, drawn on the Santa Monica and

Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [8]

COUNT EIGHT

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8, Sec. 2.6 (8 F. R. 3783)]

On or about November 30, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, two sugar ration checks drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 2,500 pounds of sugar each to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 5,000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [9]

COUNT NINE

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8,
Sec. 2.6 (8 F. R. 3783)]

On or about October 30, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 5,000 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 5,000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [10]

COUNT TEN

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8,
Sec. 2.6 (8 F. R. 3783)]

On or about November 7, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on be-

half of the Italian American Import Co., purporting to transfer 2,500 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 2,500 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [11]

COUNT ELEVEN

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8, Sec. 2.6 (8 F. R. 3783)]

On or about November 20, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 3,000 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 3,000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [12]

COUNT TWELVE

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8,
Sec. 2.6 (8 F.R. 3783)]

On or about November 29, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 2,500 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 2,500 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America.

A True Bill.

JOHN M. McADAM,
Foreman

JAMES M. CARTER
United States Attorney

[Endorsed]: Filed May 14, 1947. Edmund L. Smith,
Clerk. [13]

[Minutes: Monday, May 26, 1947.]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for arraignment and plea of defendant James M. Mosca, otherwise known as James M. Fly; Homer H. Bell, Assistant U. S. Attorney, appearing as counsel for the Government; Chas. H. Carr, Esq., appearing as counsel for the said defendant, who is present on bond:

The defendant states his true name is James M. Fly.

It is ordered that the cause is hereby continued to June 9, 1947, at 10 a. m., for plea, pursuant to request of defendant. [14]

[Minutes: Monday, June 23, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

Further hearing on motion filed June 6, 1947, to dismiss;

R. H. Kinnison, Ass't U. S. Att'y for Gov't;

Chas. H. Carr, Esq., for defendant, who is present on bond:

Attorney Carr waives reading of the Indictment and the defendant pleads not guilty to all 12 counts.

Said motion to dismiss is denied.

Case set for trial July 22, 1947, 10 A. M., before Judge Ling. [20]

[Minutes: Thursday, September 25, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

For further jury trial; Homer H. Bell, Ass't U. S. Att'y, present for Gov't; Chas. H. Carr, Esq., present for defendant, who was charged as Mosca, and who is present on bond; and the jury being present;

Court instructs the jury. Attorney Carr states he has objections to the instructions as given.

At 11 A. M. the jury is excused and withdraws from the court room and in the absence of the jury, Attorney Carr argues his objections. Attorney Bell states and argues an objection.

At 11:06 A. M. the jury is brought back into court and the Court informs the jury that the instructions stand as heretofore given.

Glenn Fuller is sworn as bailiff to take charge of the jury during its deliberation upon a verdict, and at 11:08 A. M. jury retires to deliberate.

Instructions as given and as refused are filed.

At 11:30 A. M. the jury request, and on order of Court are given through the bailiff, the instructions. At noon the jury request, and on order of Court are given through bailiff, the Indictment.

At 12:15 P. M. court reconvenes herein and the jury being present, defendant and counsel being present, verdict is presented, read, and ordered filed and entered herin, to-wit:

* * * * *

Court discharges the jury from the case and excuses them until further notice. Court orders the case referred to the Prob. Officer for investigation and report and continued hereby to Oct. 3, 1947, 1:30 P. M., for hearing said report and sentence, defendant meantime to remain on bond. [21]

[Title of District Court and Cause]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, James M. Fly,

Guilty as charged in Count One of the Indictment;
and

Guilty as charged in Count Two of the Indictment;
and

Guilty as charged in Count Three of the Indictment;
and

Guilty as charged in Count Four of the Indictment;
and

Guilty as charged in Count Five of the Indictment;
and

Guilty as charged in Count Six of the Indictment;
and

Guilty as charged in Count Seven of the Indictment;
and

Guilty as charged in Count Eight of the Indictment;
and

Guilty as charged in Count Nine of the Indictment;
and

Guilty as charged in Count Ten of the Indictment;
and

Guilty as charged in Count Eleven of the Indictment;
and

Guilty as charged in Count Twelve of the Indictment.

Dated: September 25th, 1947.

WILLIAM J. DORAN

Foreman of the Jury.

[Endorsed]: Filed Sep. 25, 1947. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

NOTICE OF RENEWAL OF MOTION FOR JUDG-
MENT OF ACQUITTAL UNDER RULE 29 OF
FEDERAL RULES OF CRIMINAL PROCE-
DURE

To Plaintiff, United States of America, and to James M. Carter, United States Attorney for the Southern District of California, and to Norman W. Neukom and Homer H. Bell, Assistant United States Attorneys for Said District, 600 Federal Building, Los Angeles, California, Attorneys for Plaintiff:

Please Take Notice that the Defendant in this case, James M. Fly, will, in the United States District Court for the Southern District of California, Central Division, on October 3, 1947, at 1:30 P. M., or as soon thereafter as the Motion can be heard in the courtroom of the Hon. Leon R. Yankwich, renew his Motion for Judgment of Acquittal under Rule 29, Federal Rules of Criminal Procedure as to Counts 1 to 7 of the Indictment, both inclusive.

CHARLES H. CARR

Attorney for Defendant, James H. Fly [23]

[Title of District Court and Cause]

RENEWAL OF MOTION FOR JUDGMENT OF
ACQUITTAL UNDER RULE 29 OF FEDERAL
RULES OF CRIMINAL PROCEDURE AND
POINTS AND AUTHORITIES

Defendant James M. Fly renews his Motion for Judgment of Acquittal to Counts One to Seven of the Indictment, both inclusive.

CHARLES H. CARR

Attorney for Defendant James M. Fly [24]

Received copy of the within Notice and Renewal of Motion this 30th day of September, 1947. James M. Carter, U. S. Atty., Attorney for Plaintiff, by L. Wayne Thomas, Chief Clerk.

[Endorsed]: Filed Sep. 30, 1947. Edmund L. Smith, Clerk. [25]

[Minutes: Friday, October 3, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

For hearing report of Prob. Officer and for sentence; and for hearing renewed motion of defendant, filed Sept. 30, 1947, for judgment of acquittal; Homer H. Bell, Ass't U. S. Att'y, present for Gov't; Chas. H. Carr, Esq., present for defendant, who is present;

Court makes a statement re motion. Court denies motion for acquittal. Attorney Bell makes a statement.

Court pronounces sentence upon defendant and fines him as follows:

* * * * *

Vic Nardoni, who bonded defendant, consents and Court orders defendant remain on present bond until notice of appeal has been filed, and have stay of execution until time for filing notice of appeal has expired. [26]

District Court of the United States for the
Southern District of California
Central Division

No. 19,342 Criminal

Indictment—12 counts

18 U. S. C. 80; 50 U. S. C. App. 633

UNITED STATES OF AMERICA

v.

JAMES M. FLY (charged as James M. Mosca)

JUDGMENT AND COMMITMENT

On this 3rd day of October, 1947, came the attorney for the government and the defendant appeared in person and by counsel, Charles H. Carr, Esq.,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty to all counts, and a verdict of guilty as to all counts of the offenses of (ct 1) that on or about Nov. 11, 1946 in the County of Los Angeles, Calif., defendant knowingly and wilfully made and used a false bill, account, claim and certificate to-wit a sugar ration check for 10,000 pounds sugar knowing the same to contain a fraudulent and fictitious statement to the U. S. government in that there was no sugar ration account as indicated by the check (cts 2-7 inc charge violations similar to that of ct 1); (ct 8) that on Nov. 30, 1946 in said county, defendant wilfully transferred sugar ration checks contrary to law; (cts 9-12 are similar to that of ct 8), as charged in said Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution of the jail type for a period of one year on count 1, one year on count 2, one year on count three, one year on count 4, one year on count 5, one year on count 6, and one year on count 7; sentences on each counts 2, 3, 4, 5, 6, and 7 to begin and run concurrently with sentence imposed on count 1; that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution of the jail type for a period of one year on count 8, said sentence on count 8 to run consecutively with sentences imposed on counts 1 to 7 inclusive; that the defendant pay unto the United States of America a fine of \$10,000.00 on count 9, a fine of \$5,000.00 on count 10, a fine of \$5000.00 on count 11, and a fine of \$5000.00 on count 12 (making a total of \$25,000.00 in fines), and stand committed to an institution of the jail type till said fines are paid or defendant is discharged therefrom by due process of law.

It Is Ordered that execution on each counts 1 to 12 inclusive is stayed until the time for filing notice of appeal from this judgment has expired.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

LEON R. YANKWICH

United States District Judge.

[Endorsed]: Filed Oct. 3, 1947. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

NOTICE OF APPEAL

Name and Address of Appellant: James M. Mosca, otherwise known as James M. Fly 5138 Maplewood Avenue, Los Angeles, Los Angeles, California

Name and Address of Appellant's Attorney: Charles H. Carr 675 Subway Terminal Building, Los Angeles, Calif.

Offense: Title 18, U. S. C., Sec. 80; Title 50, U. S. C., App., Sec. 633; Gen. Ration Ord. 8, Secs. 2.6 and 2.9.

Concise Statement of Judgment or Order, Giving Date, and Any Sentence:

Defendant having been found guilty on twelve counts of the Indictment, the Court, on October 3, 1947, pronounced judgment as follows:

The Court ordered Defendant committed to the [28] custody of the Attorney General for imprisonment for a period of one year on each of the first seven counts of

the Indictment, both inclusive, sentences on all seven counts to begin and to run concurrently with the sentence imposed on the first count, and for a period of one year on the eighth count of the indictment, said term of imprisonment on the eighth count to begin to run at the termination of the sentence imposed on the first count.

The Court also imposed a fine of Ten Thousand & No/100 (\$10,000) Dollars on the ninth count of the Indictment, and fines of Five Thousand & No/100 (\$5,000) Dollars each on the tenth, eleventh and twelfth counts of the Indictment, making a total fine of Twenty-five Thousand & No/100 (\$25,000) Dollars; the defendant to stand committed until the fines are paid.

The above judgment was entered October 3, 1947.

The above-named appellant, James M. Mosca, otherwise known as James M. Fly, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 9th day of October, 1947.

CHARLES H. CARR

Attorney for Appellant

[Endorsed]; Filed Oct 9 1947. Edmund L. Smith,
Clerk. [29]

[Title of District Court and Cause]

STIPULATION FOR TRANSMISSION OF ORIGINAL EXHIBITS TO NINTH CIRCUIT COURT OF APPEALS

It Is Hereby Stipulated between Counsel for the Defendant, James M. Mosca, otherwise known as James M. Fly, and Counsel for the Plaintiff, United States of America, subject to order of the Court and pursuant to Rule 75(i), Federal Rules of Procedure, that all of the original exhibits in the above-entitled case may be withdrawn from the files of this Court and forwarded by the Clerk of the United States District Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for inspection by the Appellate Court in lieu of copies thereof, and that said original exhibits may be returned to the Clerk of [32] the United States District Court after they have served their purpose.

Dated: October 28, 1947.

CHARLES H. CARR

Attorney for Defendant

JAMES M. CARTER

United States Attorney for the Southern District
of California, Attorney for Plaintiff, United
States of America

By HOMER H. BELL

Assistant United States Attorney.

[Endorsed]: Filed Oct 29 1947. Edmund L. Smith,
Clerk. [33]

[Title of District Court and Cause]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS TO NINTH CIRCUIT COURT OF
APPEALS

Defendant, James M. Mosca, otherwise known as James M. Fly, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment herein entered on October 3, 1947; and

The said Defendant and Plaintiff having, through their attorneys, by stipulation agreed that all original exhibits in the within action may be transmitted to the Circuit Court of Appeals for the Ninth Circuit; and

The Court having, under Rule 75(i), Federal Rules of Civil Procedure, deemed it necessary and appropriate that all original exhibits in the within action be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and that the originals be inspected by said Appellate Court; [34]

It Is Hereby Ordered, Adjudged and Decreed that all original exhibits in the within action shall be withdrawn from the files of this Court and transmitted by the Clerk thereof to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit so that said original exhibits may be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and the originals inspected by said Appellate Court; and

It Is Further Ordered, Adjudged And Decreed that after said original exhibits have served their purpose in

said Appellate Court, they be returned by the Clerk of the Circuit Court of Appeals for the Ninth Circuit to the Clerk of the United States District Court for the Southern District of California.

PAUL J. McCORMICK

Judge U. S. District Court

Presented by

CHARLES H. CARR

Attorney for Defendant

Approved as to form:

JAMES M. CARTER

United States Attorney for the

Southern District of California

By Homer H. Bell

Assistant United States Attorney

[Endorsed]: Filed Oct. 29, 1947. Edmund L. Smith,
Clerk. [35]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 35, inclusive, contain full, true and correct copies of Indictment; Minute Order dated May 26, 1947; No-

tice of Motion to Dismiss the Indictment; Motion of Defendant to Dismiss the Indictment; Minute Order dated June 23, 1947; Minute Order dated September 25, 1947; Verdict; Notice of Renewal of Motion for Judgment of Acquittal under Rule 29 of Federal Rules of Criminal Procedure; Renewal of Motion for judgment of Acquittal under Rule 29 of Federal Rules of Criminal Procedure and Points and Authorities; Minute Order dated October 3, 1947; Judgment and Commitment; Notice of Appeal; Designation of Contents of Record on Appeal; Stipulation for Transmission of Original Exhibits to Ninth Circuit Court of Appeals; and Order for Transmission of Original Exhibits to Ninth Circuit Court of Appeals, which, together with one volume of reporters' transcript, original Government's exhibits 1, 2, 3, 4, 5, 6, 7, 7-A, 7-B, 8, 9, 10, 11, 12 and 13, and original Defendant's exhibits A-1 and A-2 transmitted herewith, constitute the record on appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$9.40, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court, this 14th day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By R. B. Clifton

Deputy Clerk

[Title of District Court and Cause.]

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, September 23, 1947

Appearances:

For the Plaintiff: James M. Carter, Esquire, U. S. Attorney, by Homer H. Bell, Esquire, Asst. U. S. Attorney.

For the Defendant: Charles H. Carr, Esquire.

Los Angeles, California, Tuesday, Sept. 23, 1947,
1:00 P. M.

The Court: You may call the case, Mr. Clerk.

The Clerk: United States of America, plaintiff, versus James M. Mosca, otherwise known as James M. Fly, defendant. No. 19,342-Y, Criminal.

Mr. Carr: The defendant is ready, your Honor.

Mr. Bell: The plaintiff is ready.

(Whereupon a jury was duly impaneled and sworn.)

The Court: Do you desire to make an opening statement?

Mr. Bell: Yes.

Mr. Carr: If the court please, I think it is probably appropriate since I am going to ask that the Government witnesses be excluded as well as my own, that they be excluded now before the opening statements are made. Sometimes I think it is advisable for them not to have the benefit of the opening statements.

The Court: You say none of your witnesses are here.

Mr. Carr: They will be excluded along with the Government's witnesses.

The Court: The witnesses for the Government and the defendant will follow the bailiff and remain absent from the courtroom during the proceedings until called. Call your first witness.

Mr. Bell: May Mr. Austin remain in the courtroom? [4*]

Mr. Carr: I have no objection to him staying here.

Mr. Bell: And, your Honor, may we have permission for the man who investigated the case to stay here at the table with me?

The Court: Mr. Carr knows that we do not exclude investigators for any board or the F.B.I. or any person employed by an investigating body.

Mr. Carr: Yes, your Honor.

The Court: You may proceed.

(Opening statement by Mr. Carr.)

(Opening statement by Mr. Bell.)

The Court: You may proceed, gentlemen. Let the record show the jury is in the box and the defendant is in court with his counsel.

Mr. Bell: I have submitted to the clerk certain requested instructions on behalf of the Government.

The Court: All right.

Mr. Bell: Mr. Austin, will you take the stand?

Mr. Carr: May we have a copy of the requested instructions?

Mr. Bell: A copy was placed on counsel's table.

The Court: Very well. [5]

*Page number appearing at top of page of original Reporter's Transcript.

WILLIAM H. AUSTIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William H. Austin.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Austin?

A. I am manager of the Unit W for Smart & Final Company.

Q. Were you so occupied during the year 1946?

A. Yes, sir.

Q. Do you know the defendant, Mr. James Fly?

A. Yes, sir.

Q. How long have you known him?

A. Since about 1944.

Q. Did you ever meet Mr. Fly in connection with your duties at Smart & Final Company?

A. Yes, sir.

Q. Did you have any conversation with him in connection with your duties at all?

A. Yes, sir.

Q. When was the first occasion, do you recall?

A. About July.

Q. What year? [6] A. 1946.

Q. Where did the conversation take place?

A. Took place at Unit W, the unit I manage.

Q. Was anyone else present? A. No, sir.

Q. What was the conversation that you had?

A. Well, Mr. Fly came into my store and said he had a lot of—wanted to buy a lot of sugar—buy 10,000 pounds at a time and he said the deal was legitimate.

(Testimony of William H. Austin)

He wanted to know whether or not I could get him that amount of sugar. I told him no, that—I told him I could but I couldn't get it direct from our main warehouse; that I would have to call and see how it would have to be handled—whether I could get it from our main warehouse or direct from the C & H Sugar Company.

Mr. Carr: It is awfully hard to hear you, Mr. Witness. Will you speak a little louder?

Q. By Mr. Bell: Did he say anything to that?

A. Yes. He told me to go ahead and call Fred Junker, who is our buyer in Glendale and find out how I could get it delivered and this I did.

Q. Did you thereafter have any further conversation with Mr. Fly?

A. Yes, the following Monday.

Q. And where did that conversation occur? [7]

A. That was also in my store at Melrose and Fairfax.

Mr. Carr: I can't hear you, Mr. Witness.

The Court: Speak louder, please.

Mr. Bell: He said that was at Melrose and Fairfax.

The Witness: Melrose and Fairfax, yes.

Q. By Mr. Bell: Was anyone else present?

A. No.

Q. What was the conversation?

A. Well, I told him that I could get his sugar delivered and it would probably come Tuesday or Wednesday.

Q. What did he say, if anything?

A. He said, "Okay, go ahead and place the order."

(Testimony of William H. Austin)

Q. What happened after that?

A. He gave me a check for 10,000 pounds, the point check for the sugar and also a check for the money for the 10,000 pounds.

Q. Pardon me. You have said pounds and points. Which do you recall it to be? A. (No answer.)

Q. You said the check was made out for something, 10,000 what? Points or pounds?

A. 10,000 pounds.

Q. Did you see him write the check? A. Yes.

Q. What happened after that, if anything? [8]

A. Well, the sugar was delivered on a Tuesday or Wednesday and I called Mr. Fly and told him that the sugar was there and he sent a truck to pick it up.

Q. What did you do with the check?

A. The check? I sent the check in to the—the sugar check?

Q. Yes, the sugar check.

A. The sugar check I deposited it at my bank.

Q. Did you have any other dealings with Mr. Fly after that? A. Yes, the following Saturday.

Q. What happened?

A. I picked up another at his Sunset store. He told me to come by, which I did, and picked up another check for ten thousand pounds, check for the money to pay for the ten thousand pounds of sugar.

Q. Did you see him write that check?

A. Yes, sir.

Q. Do you know a man by the name of Woodrow Larson? A. Yes, sir.

Q. Who is he?

A. He was my helper at Unit W at that time.

(Testimony of William H. Austin)

Q. Did you have other dealings with Mr. Fly following that?

A. Yes, sir; about six to eight weeks following that [10] I had the same procedure. Every week I would go by his cafe on Riverside Drive and pick up the check for the sugar. I would order the sugar and it would be delivered either Tuesday or Wednesday of that week.

Q. How much sugar did you sell him in all?

A. Altogether about 124,700 pounds.

Mr. Carr: I move to strike that question and answer, your Honor, as being wholly immaterial—the amount he sold him.

Mr. Bell: It is a course of conduct.

The Court: Yes, objection overruled.

Q. By M. Bell: You said you picked up the checks. Did you see him sign the checks on each of these occasions? A. Yes, sir.

Mr. Bell: I would like to have the clerk mark for identification a check and what appears to be an invoice of the Smart & Final Company.

The Clerk: Marked as Government's Exhibit 1 for identification.

(The document referred to was marked as Plaintiff's Exhibit 1, for identification.)

Mr. Bell: I will exhibit this to counsel while I am having another one marked for identification.

I would like to have a similar pair, a check and invoice, marked for identification. [10]

The Clerk: Government's Exhibit 2, for identification.

(Testimony of William H. Austin)

(The documents referred to were marked as Plaintiff's Exhibit 2, for identification.)

Mr. Bell: I show defendant's counsel Government's Exhibit 2, and ask that another pair of check and invoice be marked for identification.

The Clerk: Government's Exhibit 3 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 3, for identification.)

Mr. Bell: I exhibit Government's Exhibit 3 to counsel, and ask that another pair be marked for identification.

The Clerk: Government's Exhibit 4.

(The document referred to were marked as Plaintiff's Exhibit 4, for identification.)

Mr. Bell: I show Government's Exhibit 4 to counsel, and ask another pair be marked for identification.

The Clerk: Government's Exhibit 5, for identification.

(The documents referred to were marked as Plaintiff's Exhibit 5, for identification.)

Mr. Bell: I exhibit Government's Exhibit 5 to counsel for defendant, and ask that another pair, a check and invoice, be marked for identification.

The Clerk: Government's Exhibit 6 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 6, for identification.) [11]

Mr. Bell: I now exhibit Government's Exhibit 6 to counsel.

(Testimony of William H. Austin)

Q. By Mr. Bell: Mr. Austin, when these transactions took place were any records of them made for your company?

A. Yes, sir. I sent the original copy to our main office in Glendale.

Q. You say you sent the original copy. What did you make? What kind of record?

A. (No answer.)

Q. What kind of record did you make for your company?

A. We have sales books. We make an original copy and a duplicate for the customer.

Q. Well, is that what you call an invoice?

A. Yes, sir, an invoice.

Q. And after you made them—was it the regular course of your business to make such records?

A. Yes, sir.

Q. And were those record made in the regular course of your business? A. Yes, sir.

Q. When you say you sent them to the company, where did you send them?

A. To our main offices in Glendale.

Q. Mr. Austin, I exhibit to you Government's Exhibits Nos. 1, 2, 3, 4, 5, and 6 for identification and ask you to [12] examine the checks and state whether or not those are checks given to you, signed by Mr. Fly, as you have described during the course of your testimony? A. Yes, they are.

Q. I believe you stated it was your custom to go by Mr. Fly's place of business or one of his places of business, and pick up the checks. Were the invoices which constitute the other part of these Government

(Testimony of William H. Austin)

exhibits, Nos. 1 to 6, inclusive, made out at the same time the check was picked up in all instances?

A. No, sir; they were not.

Q. How did that happen?

A. The invoices were made out at the time the sugar was actually picked up, delivered and picked up.

Q. And the check might have been given at some other time? A. Yes, sir.

Q. Now, looking at the second portion of Government's Exhibits Nos. 1 to 6, inclusive, will you state whether or not those are the records which were made and kept in the regular course of your business as you have testified? A. Yes, sir.

Mr. Bell: The Government offers these in evidence as Government's Exhibits 1 to 6, inclusive.

Mr. Carr: I would like, your Honor, and I had better [13] preface my objection with the realization that I, for a long time, have known that possibly it is not good procedure to object on the ground that the first seven counts do not state an offense, but since we have been changing the rules so fast I think I am going to adopt the objection that, and objection of these on the ground that counts 1 through 7, both inclusive, do not state an offense.

The Court: Unless you particularize more—

Mr. Carr: I will take that up fully at the time of my motion.

The Court: That motion does not lie. That is what they call a "speaking demurrer." It does not lie under the new one and I do not permit it under the old one.

Mr. Carr: But I would like to have it go in the record that way.

The Court: All right, the objection is overruled.

(Testimony of William H. Austin)

(The documents heretofore marked as Plaintiff's Exhibits 1 to 6, inclusive, were received in evidence.)

Q. By Mr. Bell: In the case of all these checks, Mr. Austin, did you deposit them, as you said you deposited the first one? A. Yes, sir.

Mr. Bell: You may cross examine. [14]

Cross Examination

By Mr. Carr:

Q. Your name is Mr. Austin—did I understand you correctly? A-u-s-t-i-n? A. Yes, sir.

Q. How long have you worked for the Smart & Final Company? A. Since the early part of 1944.

Q. As a matter of fact, Mr. Austin, you had this conversation in July. You say you had it in person with Mr. Fly. You had it on the telephone, didn't you?

A. No, I did not.

Q. Where were you when you had the conversation?

A. In my store at Fairfax and Melrose, Unit W.

Q. You are sure of that? A. Yes, sir.

Q. Don't you recollect you first had that conversation on the telephone and you later met Mr. Fly, about a month later? A. No, sir.

Q. Was that the first time you had ever talked to Mr. Fly? A. In regard to sugar, yes.

Q. Had you ever talked to him previously? [15]

Q. Had you ever talked to him previously?

A. Well, I have known Mr. Fly since 1944, at which time I was manager of Unit 63 for Smart & Final at Vermont and Santa Monica.

Q. He had purchased commodities from you previous to that time? A. That is right.

(Testimony of William H. Austin)

Q. As a matter of fact he had purchased sugar from you and given you checks, hadn't he?

A. Small amounts for his grocery, yes, sir.

Q. Gave you checks, did he not?

A. Yes, sir.

Q. And those checks were cashed at the bank, were they not?

A. As far as I know they were.

Q. And you knew that Mr. Fly, from your own knowledge, you knew that Mr. Fly had an account at the Bank of America. Santa Monica and Vermont Branch, did you not?

Mr. Bell: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

Q. By Mr. Carr: Did you of your own knowledge know he had an account at the Santa Monica and Vermont Branch of the Bank of America, a ration account?

A. Yes, sir. [16]

Q. As a matter of fact he gave you checks on that account prior to these checks, and I am speaking now beginning with Government's Exhibit No. 1, which is dated November 11, 1946. He had given you checks on that same bank ration account—checks previous to that time, hadn't he?

A. He had about a year before. I was in the Army about a year.

Q. And those checks had gone through and cleared, hadn't they?

A. Yes.

Mr. Bell: Objected to as calling for a conclusion of this witness.

The Court: Objection overruled.

(Testimony of William H. Austin)

Q. By Mr. Carr: You say they did clear?

A. I don't know whether they did or not.

Q. You didn't get a call from the bank, did you?

A. No.

Q. Now, when these did not clear did you hear from the bank? A. No.

Q. How did you find out that these did not clear?

A. I didn't know that those hadn't cleared. Otherwise I would not have kept selling the sugar.

Q. But you do know that previous to November 11, 1946, you had received at least several checks, sugar ration [17] checks from Mr. Fly?

A. At least a year before that time I had taken some.

Q. And you never heard from those checks again, did you? A. No.

Q. Now, I want to ask you if you have ever been out to any of Mr. Fly's stores and restaurants?

A. Yes, sir, I have.

Q. Do you know what names appear on the signs or how they are labeled on the outside? Was it the "Italian Delicatessen" or just what appears on the sign?

A. On the Sunset store I believe it is "Italian-American Delicatessen".

Q. And the word "Import" appears on there too, does it not? A. To my knowledge no, it doesn't.

Mr. Bell: I will object to this as incompetent, irrelevant and immaterial. This is not a competent way of proving the man had a bank account in that name.

The Court: Objection overruled.

Q. By Mr. Carr: You have been in his place at 4356 Sunset, haven't you? A. Yes, sir.

(Testimony of William H. Austin)

Q. And it is a fact, isn't it, it appears out there in the form of a sign "Italian and American" and under it [18] the word "Groceries"?

A. I believe so.

Q. And under that the words "Wines-Delicatessen". Do you remember those words appearing there?

A. I believe so.

Q. Now, over at 8279 Santa Monica—you have been to that place, too, haven't you? A. Yes, sir.

Q. And on that it appears "Hollywood Italian-American Delicatessen"? A. I don't know.

Q. Well, the point I am getting at is in dealing with Mr. Fly you knew that he was the proprietor of both those places, didn't you? A. Yes, sir.

Q. And isn't it a fact, Mr. Austin, that prior to November 11, 1946, you did receive some checks instead of being made out and signed as Exhibit No. 1 is signed, they were signed "Italian-American Delicatessen" by Mr. Fly. Do you remember those checks? A. No.

Q. You think that all of them were signed "Italian-American Import Company"?

A. As far as I can remember they were.

Q. I note on your office copy of—what do you call [19] this attached to Exhibit 1 here? How do you designate that piece of paper?

A. That is our original invoice. In other words, our office copy.

Q. And a copy of this invoice would go to the customer is that right? A. Yes.

Q. And I notice it is just made out to James M. Fly Cafe at 28—is that 88? A. That is 2880.

Q. Riverside. So you knew at the time you were dealing with a sole proprietor, to-wit, James Fly?

(Testimony of William H. Austin)

A. Yes, sir.

Mr. Bell: Objected to as calling for a conclusion of the witness and I move it be stricken.

The Court: All right.

Mr. Carr: If you want me to qualify him I will do it.

Q. By Mr. Carr: You used to work for Mr. Fly, didn't you? A. Yes, sir.

The Court: I don't think this is proper cross examination. If you want to use him as your own witness you may do so later on.

Mr. Carr: Very well, your Honor.

Q. By Mr. Carr: By the way, you have not been charged [20] in any case in connection with this offense, have you? A. No, sir.

Q. And in no Federal Court are you now charged with any offense in connection with these checks?

A. No, sir.

Q. Approximately how much did you receive from Mr. Fly in connection with these checks?

Mr. Bell: Objected to, your Honor. There is no testimony of any kind that he received anything.

Mr. Carr: I am testing the man just as you do any witness on cross examination.

The Court: Yes, go ahead.

The Witness: I didn't receive a thing from Mr. Fly except the check for the 10,000 pounds of sugar and the check for \$858 or \$811, whichever the OPA price happened to be for the sugar.

Q. By Mr. Carr: You never got anything for yourself? A. No, sir.

Q. Isn't it a fact that you got approximately \$1,500 from Mr. Fly? A. No, sir, it is not.

(Testimony of William H. Austin)

Q. You deny under oath that you ever got a nickel?

A. I do.

Mr. Carr: That is all.

The Court: All right, call your next witness. [21]

Mr. Carr: May I recall this witness for just two questions. He is still here.

The Court: Yes.

Q. By Mr. Carr: What was the address, sir, of the store in which you worked for Smart & Final?

A. At which I work now?

Q. No, where you worked at the time these checks were given to you. A. 726 North Fairfax.

Q. And you picked the checks up, all of these checks over where? At Mr. Fly's place of business?

A. Yes.

Q. What was that address?

A. His cafe on Riverside Drive. I don't know the exact address.

Q. Why did you go all the way over there to pick up these checks?

A. Because I was told to do so, to order the sugar for him and come by and pick up the checks. It is my business to promote business.

Q. You didn't have any trouble selling sugar at that time, did you? A. A certain amount of it.

Mr. Carr: That is all. [22]

Redirect Examination

By Mr. Bell:

Q. Was that on your way home?

A. Yes, sir; it was on my way home in Glendale.

Mr. Bell: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Honigs.

DAVID HONIGS,

a witness called as a witness by the Plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: David Honigs.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Honigs?

A. Baker.

Q. Do you know Mr. Fly? A. Yes, sir.

Q. Did you say yes? A. I do.

Q. How long have you known him?

A. Well, I would say about six months or so.

Q. Did you know him—when did you first meet him? [23]

A. Well, I wouldn't know the exact date but around, oh, about October, the latter part of October.

Q. October, 1946? A. Yes.

Q. Where did you meet him?

A. At his place of business.

Q. Will you keep your voice up?

A. His place of business.

Q. And where is that?

A. On Riverside Drive.

Q. Did you have a conversation with him?

A. Well, rather short conversation.

Q. Well, I mean on the occasion when you first met him did you have a conversation—did you talk to him?

A. Yes, sir.

Q. Was anyone else present? A. No.

Q. Do I understand that that was sometime in the latter part of October of 1946 that you are talking about?

A. Yes.

(Testimony of David Honigs)

Q. Will you relate the conversation that you had?

A. Well, just merely that I asked him if I could— knowing that he had extra sugar—

Q. Just state what you said to him and what he said to you. [24]

A. Well, if it was possible for me to get a little sugar for my place of business and he said it was, so I asked him if I could have 50 sacks, which was 5,000 pounds, and he wrote the check for it.

Q. Pardon me. Did all the jurors hear the last answer?

A Juror: No, I didn't.

Mr. Bell: Would you read the answer, Mr. Reporter?

(Answer read.)

Mr. Bell: I would like to have the check marked 7 for identification.

(The document referred to was marked Plaintiff's Exhibit 7 for identification.)

Q. By Mr. Bell: I show you a check marked Government's Exhibit 7 for identification and ask you if you can recognize that as the check he handed to you on that occasion? A. I believe so.

Q. Did he make it out in your presence?

A. Yes.

Q. After he made it out what did he do with it? Strike that. What happened after that?

A. Nothing.

Q. Keep your voice up.

A. I paid him and took the check.

(Testimony of David Honigs)

Q. You paid him what? How much did you pay him? [25]

A. I don't remember the exact amount. It was \$18.50 a hundred.

Q. Was that for the check or was that for the sugar?

A. The check, the points.

Q. After you received this check what did you do with it? A. Well, then I gave it to the salesman.

Q. What was his name?

A. His name was Walsma.

Mr. Bell: We offer No. 7 in evidence, your Honor.

The Court: It may be received.

(The document referred to was marked Plaintiff's Exhibit No. 7 and admitted in evidence.)

Mr. Bell: You may cross examine.

Cross Examination

By Mr. Carr:

Q. Mr. Honigs, is it Honigs? A. Yes, sir.

Q. Weren't you charged in connection with these transactions in some case up here in the Federal Court?

A. Yes.

Q. What did you do? Enter a plea of guilty?

A. Yes, sir.

Q. Have you already been sentenced? [26]

A. Yes, sir.

Q. How much did you say you gave Mr. Fly?

A. I don't remember the exact amount. That is \$18.50 per hundred.

(Testimony of David Honigs)

Q. Isn't it a fact that is what you were telling somebody else you paid?

A. That is what I did. I got the sugar for myself.

Q. You were telling him you were paying \$18.50 so you could add some profit?

A. No, sir.

Q. You were not getting any profit yourself?

A. No, sir; that sugar was for myself, for my own use.

Q. You used the sugar yourself?

A. Yes, sir.

Q. You did not sell any of it?

A. No, sir.

Q. And how much did you say you paid Mr. Fly?

A. \$18.50.

Q. Per hundred?

A. Yes, sir.

Q. What was sugar selling for at that time?

A. I don't remember. I believe it was \$6.50 or \$7.50. I believe it was \$6.50 a hundred.

Q. Why do you look at the prosecutor when you are saying that? [27]

A. I am not looking at the prosecutor. I am just looking in general. I believe it was \$6.50 a hundred.

Q. Has the prosecutor talked to you about this case?

A. He reviewed the facts with me.

Q. I assume you told him nothing but the truth?

A. Yes, sir, exactly.

Q. And the prosecutor told you, of course, to tell nothing but the truth?

A. That is right.

Mr. Carr: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Walsma.

HENRY WALSMAS,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Henry Walsma.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Walsma?

A. Salesman.

Q. For what company?

A. Bakers Purchasing Company. [28]

Q. You are also president of that company, are you not?

A. Yes, sir.

Q. Will you answer audibly, please?

A. Yes, sir.

Q. Do you know Mr. Honigs? A. Yes, sir.

Q. Did you ever receive a check from Mr. Honigs for sugar?

A. I received a check for sugar, yes, sir.

Q. I show you Government's Exhibit 7 which appears to be a check made out to Bakers Purchasing Company for five thousand pounds of sugar and signed "Italian Import Company, James M. Fly." Is that the check you received from him?

A. Well, I wouldn't say just exactly that is the check but I received a couple or three checks from him.

Q. Does that appear to be one of the checks?

A. That appears to be one of the checks, sir.

Q. What did you do with the check after you received it?

A. I brought it into the office.

Q. The office? A. Yes, sir.

(Testimony of Henry Walsma)

Q. Of the Bakers Purchasing Company? [29]

A. Yes, sir.

Mr. Carr: Which exhibit is that?

Mr. Bell: This is No. 7. That is all.

Cross Examination

By Mr. Carr:

Q. W-a-l-s-m-a, is that right? A. Yes, sir.

Q. Are you the salesman for the Bakers and Confectioners? A. No, Bakers Purchasing Company.

Q. You bought the check from the man, Mr. Honigs?

A. I didn't buy the check.

Q. How did you get it? A. Given to me.

Q. He just gave you the check?

A. He gave me the check.

Q. Why did he give you Government's Exhibit No. 7? Here is a check for five thousand pounds of sugar. Just tell us why he gave it to you.

A. (No answer.)

Q. Why did he give you that check?

A. Well, sir, the check he gave me because the Bakers Purchasing Company name is on it and the fellows who made arrangement with him told me this check was made out [30]—he told me this check was made out to the Bakers Purchasing Company and wanted to get some sugar for it.

Q. Do you know who got the sugar on that check?

A. No, I don't, sir, not particularly on this check?

Q. Well, what connection then did you have with the check? How did you happen to get it?

A. Well, because I was the salesman. I called on Mr. Honigs once a week. I come there and he said,

(Testimony of Henry Walsma)

“Henry, I have got a check here for you.” I represent the Bakers Purchasing Company and of course, naturally, I take the check.

Q. You don’t know who got the sugar? You sold it but you don’t know who got it?

A. Well, maybe I know some of the fellows got some sugar but I wouldn’t say particularly this check.

Q. You were not charged in any case yourself, were you? A. Yes, sir.

Q. Did you plead guilty, too? A. Yes, sir.

Mr. Carr: That is all.

Mr. Bell: No further questions. Mrs. Appel, will you take the stand, please? [31]

ALMA APPEL,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Alma Appel.

Direct Examination

By Mr. Bell:

Q. What is your occupation, please?

A. (No answer.)

Mr. Bell: I would like to have the clerk mark what appears to be a ration deposit slip and a sheet from an account book as Government’s Exhibit 7-A and 7-B, for identification.

(The documents referred to were marked as Plaintiff’s Exhibits 7A and 7-B, for identification.)

(Testimony of Alma Appel)

Mr. Carr: Will you tell me what they are, just generally?

Mr. Bell: I will show you 7 and 7-B for identification.

Q. By Mr. Bell: What is your occupation, Mrs. Appel? A. Office manager.

Q. Will you keep your voice up so everyone on the jury can hear you? [32] A. Office manager.

Q. For what company?

A. For the Bakers Purchasing Company.

Q. Do you know Mr. Walsma? A. Yes, sir.

Q. Mr. Walsma who just left the stand a few minutes ago? A. Yes, sir.

Q. Do you know Mr. David Honigs?

A. Not until I met him today.

Q. In your duties as office manager do you keep the records for the company? A. No, not directly.

Q. Well, are they under your custody in any way?

A. The whole office is, yes.

Q. What I mean is, are the records kept under your custody? A. Yes, sir.

Q. And is it the regular course of your business to make and keep records of the transactions of your business? A. I don't think I understand your question.

Q. Well, in the regular course of your business do you make records of sales and purchases and accounts?

A. Oh, surely.

Q. And do you make those at or near the time of the [33] transaction they pertain to? A. Yes, sir.

Q. I want to show you Government's Exhibit 7 for identification and 7-B for identification and ask if either

(Testimony of Alma Appel)

or both of those were kept under your custody in the regular course of business as you have described?

A. Yes, they appear to be.

Q. Now, have you seen Government's Exhibit 7 before? A. Not to my knowledge.

Q. The Bakers Purchasing Company which appears thereon as payee, is that your company? A. Yes.

Mr. Carr: That is objected to. The check speaks for itself. She cannot explain the face of the check.

Q. By Mr. Bell: And do you know who made out 7-B?

A. I wouldn't know exactly who made it out, no.

Q. Will you describe just what 7-B is? What do you call it in your business?

A. It is a rationing record of receipts of ration evidence and disbursement of deliveries.

Mr. Carr: I can't hear you.

A. It is a record of the receipts of ration evidences and deliveries against those particular evidences.

Q. By Mr. Bell: And when you speak of "ration evidences" you refer to ration checks? [34]

A. Yes, sir.

Q. Does your company, the Bakers Purchasing Company, have a sugar ration account or did it during 1946?

A. Yes.

Q. Did you make deposits in that account?

Mr. Carr: Object to that as being immaterial.

Mr. Bell: This is a record. It is simply a foundation.

The Witness: Employees of our firm made the records, yes.

(Testimony of Alma Appel)

Q. By Mr. Bell: When you made the deposit did you make a ration deposit slip?

A. Ration deposit slips were made.

Q. Did you keep a carbon of those?

A. Yes, sir, we did.

Q. And is Government's Exhibit 7 such a ration deposit slip, carbon copy?

A. Yes, it appears to be.

Mr. Bell: We offer Exhibit 7-A and Exhibit 7-B in evidence.

Mr. Carr: Objected to as being wholly immaterial Does not prove or disprove any issue involved in any of the counts.

Mr. Bell: May I ask that 7 be considered in connection with those? It may assist your Honor to have one line pointed out in the record which she described as the receipt [35] of ration evidence.

The Court: Which one?

Mr. Bell: Does counsel care to see the line I have in mind?

Mr. Carr: No, that is all right. Just point it out. Mr. Bell. I don't quite get the purpose.

The Court: I think the purpose, as I see it, is to show, not only by the check but by the endorsement on the check, that this sugar check was honored and that is also shown by a record which she kept in the regular course of business. It is to show that it was actually honored and the transfer of sugar made.

Mr. Bell: That is correct and these trace it.

The Court: And this one so indicates.

Mr. Carr: I will withdraw the objection if that is the purpose of it.

(Testimony of Alma Appel)

The Court: Exhibit 7 is the check actually signed as the Italian-American Import Company by James M. Fly and—

Mr. Carr: I think we are just wasting your Honor's time.

The Court: All right, they may be received in evidence.

(The documents referred to were marked as Plaintiff's Exhibits 7-A and 7-B, and were received in evidence.)

Mr. Bell: That is all. [36]

Mr. Carr: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Ripley.

FRANK A. RIPLEY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank A. Ripley.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Ripley?

A. Store manager for Smart & Final Company, Unit 65.

Q. Were you so occupied in the latter part of 1946?

A. I was.

Q. And more particularly during October 1946?

A. Yes.

Q. Did you say Unit 65? A. Yes, sir.

Q. How long were you so engaged there at Unit 65?

A. I have been in that store for seven years.

(Testimony of Frank A. Ripley)

Q. Did you sell and dispose of sugar at that store?

A. Yes, sir.

Mr. Bell: I would like to have the clerk mark for identification what appears to be an invoice and two checks. [37]

(The documents referred to were marked as Plaintiff's Exhibit 8, for identification.)

Q. By Mr. Bell: I hand to counsel for the defendant a copy of Plaintiff's Exhibit 8 and ask the clerk to mark for identification another check and another invoice.

The Clerk: Plaintiff's Exhibit 9 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 9, for identification.)

Mr. Bell: I show No. 9 to counsel for the defendant and ask the clerk to mark another check and another invoice for identification.

The Clerk: That is Government's Exhibit 10 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 10, for identification.)

Mr. Bell: I show it to counsel for the defendant and ask the clerk to mark for identification another check and another invoice.

The Clerk: Plaintiff's Exhibit No. 11 for identification.

(The documents referred to were marked as Plaintiff's Exhibit No. 11, for identification.)

(Testimony of Frank A. Ripley)

Mr. Bell: I show Exhibit No. 11 to counsel and ask that the clerk mark for identification another check and another invoice. [38]

The Clerk: Government's Exhibit 12 for identification.

(The documents referred to were marked as Plaintiff's Exhibit No. 12, for identification.)

Q. By Mr. Bell: Mr. Ripley, when you disposed of, or dispensed sugar, did you receive any kind of ration evidence for dispensing such sugar?

A. Yes, we always received ration checks.

Mr. Bell: I show No. 12 to counsel for the defendant.

Q. By Mr. Bell: When you sold sugar and received a check therefor, did you make any record for your own company of the sale?

A. Made out a sales invoice similar to what you have there—just identical to that.

Q. I will ask you to look at Government's Exhibits 8 to 12, inclusive and say whether or not those are the type of invoices and those are the type of checks that you received at your unit?

A. Yes, those are checks and invoices that were made out in our store.

Q. The invoices were made out at your unit?

A. Yes.

Q. And were any of them made out by you?

A. Yes, No. 8, No. 11.

(Testimony of Frank A. Ripley)

Mr. Carr: We are wasting time, it seems to me.

Mr. Bell: We will offer them in evidence, Exhibits 8 [39] to 12, inclusive.

Mr. Carr: Other than that general objection, your Honor, that I made earlier and which your Honor referred to as a "speaking demurrer", I would like to renew that with respect to these exhibits.

The Court: That is a grand old term.

Mr. Carr: I am familiar with it but I don't want your Honor to feel I am making this without a serious reason for making it.

The Court: I understand your point. The objection is overruled. Exhibits 8 to 12, inclusive will be admitted in evidence.

(The documents referred to were marked Plaintiff's Exhibits 8 to 12, inclusive and received in evidence.)

Mr. Bell: No further questions. You may cross examine.

Cross Examination

By Mr. Carr:

Q. You never saw this man before in your life, did you? A. No.

Mr. Carr: That is all.

Mr. Bell: No further questions.

Mr. Carr: Let the record show I pointed to Mr. Fly. [40]

The Court: All right. Call your next witness.

Mr. Bell: Mr. Olsen.

NATHAN ELI OLSEN,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nathan Eli Olsen.

Direct Examination

By Mr. Bell:

Q. During the year 1946 what was your occupation, Mr. Olsen?

A. My occupation—I was manager for Smart & Final, cash and carry, 1826 Sunset Boulevard.

Q. Do you know Mr. James Fly, the defendant here?

A. Yes, I do.

Q. How long have you known Mr. Fly?

A. Well, to say exactly it would be rather difficult.

Q. Roughly?

A. It goes back before the war. Oh, I would say about 1940.

Q. About 1940? A. Yes, sir.

Q. During 1946 did you sell Mr. Fly any sugar? [41]

A. I did.

Q. Did you have any conversation with Mr. Fly in connection with the sale to him of sugar?

A. Well, to make any direct statement actually—being a salesman and making my living on a commission naturally every customer is a potential prospect for my business and I believe conversations is a good means by increasing business.

Q. Did you have a conversation with him or conversations with him?

A. Well, limited conversations.

(Testimony of Eli Olsen)

The Court: A conversation as the lawyer means is merely did you talk to him?

The Witness: Yes, your Honor.

The Court: Anything other than saying how do you do or good morning is a conversation or talking. That is what he means.

Q. By Mr. Bell: Well, did you have any conversation with him in connection with these sales of sugar that you say you made to him? A. Yes.

Q. Do you remember any particular conversation?

A. Well, the one that sticks out prominently in my mind is the fact that sugar took a slight advance, oh, sometime thereabout—I mean when I was managing that cash [42] and carry it went up. It was 10 cents or 15 cents on a hundred pounds of sugar.

Q. Can you fix the approximate date, the month?

Mr. Carr: Of what? The conversation or the increase in the price of sugar?

Mr. Bell: I mean the conversation.

The Witness: The month?

Q. By Mr. Bell: I understood you to say you had the conversation about the time there was an increase in the price of sugar.

A. Well, it was shortly thereafter—I mean right thereabouts.

Q. Do you remember then when the rise in the price of sugar took place? A. Not exactly, Mr. Bell.

Q. Well, was it the early part of 1946 or the latter part? A. It was somewhere in the middle of 1946.

Q. About the middle of 1946? A. Yes, sir.

Q. Where did the conversation take place?

A. At the store.

(Testimony of Eli Olsen)

Q. Was anyone else present?

A. There might possibly have been in the store—there could have been anywhere from 20 people on down. [43]

Q. Well, do you remember in—you say the conversation that stands out in your mind—what is your best recollection as to who was present?

A. I believe it was just the both of us or there could have been more—there could have been somebody else wandering around the store.

Q. Do you remember anybody there listening to the conversation? A. No, sir.

Q. Well, will you relate the conversation?

A. Well, word for word I couldn't relate it. However, it—

Q. Just give us the substance of it.

A. The substance of it I could relate was the fact that sugar had slightly advanced 10 or 15 cents.

Q. Did somebody say that?

A. I am relating the fact that it had and there was a squawk made, I mean, as to the price.

Q. Well, did Mr. Fly say that? A. Mr. Fly—

Q. Well, try to identify the speaker if you will, Mr. Olsen.

A. Well, sugar went up as you know. I mean in business, in the grocery business a nickel is quite a little bit on any item and because sugar had gone up and it was a [44] little bit more the squawk was made that there was no profit in it and to pay that additional 10 or 15 cents—in other words it was the bunk.

(Testimony of Eli Olsen)

Q. Did he say that to you?

A. Well, he said that he wished he had known before; that he would liked to have had it at the old price.

Q. What else was said that you recall?

A. Well, just about that business was lots of work and no profit.

Q. Well, did you sell him any sugar?

A. Yes, sir, I did.

Q. When you sold him sugar did you receive from him any ration evidence? A. Yes, sir, I did.

Q. What did you receive? A. A signed check.

Q. And do you recall how they were made out?

A. To Smart & Final Company for whatever the poundage may have been for the individual sale and signed by, I believe, James M. Fly.

Mr. Carr: Just a moment. I object to the witness relating what the instruments purport to show, your Honor. The instruments speak for themselves.

The Court: That is correct.

Mr. Bell: We will show your Honor that these particular [45] instruments were destroyed.

The Court: Well, you should show that first.

Q. By Mr. Bell: Do you recall how the signature appeared?

Mr. Carr: If the court please, I think counsel should show that they disappeared and that the records are not in existence.

The Court: First of all he has to show it is an instrument traceable to the defendant and the only way he can do it is by showing that.

Mr. Bell: Do I understand the witness may answer the question?

(Testimony of Eli Olsen)

The Court: Yes.

Q. By Mr. Bell: What appeared at the bottom by way of signature or maker?

A. The signature of the maker was James M. Fly.

Q. Do you recall anything else?

A. Italian-American Importing Company.

Q. Italian-American Importing Company?

A. Yes.

Q. Will you keep your voice up, please?

A. I am sorry. The signature was James M., I believe, Fly, Italian-American Importing Company.

Q. Do you recall on how many occasions, approximately, you sold to Mr. Fly? [46]

Mr. Carr: I object to all this. It doesn't go to prove any issue in this case. It is prejudicial. It confuses the issues in the case.

The Court: Let us confine ourselves for the present at least, to the counts in the indictment. You have 12 counts and let us not bring in any outside matters. Later on we will determine, if similar transactions are offered on the subject of intent, whether it is admissible. I will pass on that matter at that time.

Q. By Mr. Bell: Do you recall any other conversations, other than the one that you related a few minutes ago, with Mr. Fly? A. Well, directly—

Q. Did you have any talk with him about anything in connection with these sales?

A. Well, about all that it would have amounted to, which I believe would have been to the extent that I was interested in more business for the store of all types of business.

(Testimony of Eli Olsen)

Q. By way of refreshing your memory do you recall asking him what he was doing with the sugar?

Mr. Carr: If the court please, I do not think there is any basis for refreshing the witness' recollection at this particular point. As a matter of fact, I am going to move to strike all the testimony of this witness, his testimony [47] being wholly without the issues of the case and not proving or disproving any issue in the indictment, and is working to the prejudice of this defendant.

The Court: Well, the motion will be denied but I will sustain the objection to the question last asked.

Q. By Mr. Bell: Do you recall any other conversations that you had with him?

A. Yes. I believe a remark was made that—I questioned—I mean not only in this instance but practically instance—

Mr. Carr: If the court please, I have to object to what he questioned.

Mr. Bell: I think he is merely objecting to the phraseology of the witness in the use of the word "questioning". I assume he means—

Mr. Carr: I am not assuming anything.

The Court: Let the witness' language speak for itself. The jury can interpret what he means. Go ahead.

The Witness: In conversing it seems that I recollect a conversation that was in part—whether it was in part or total one time or at another or several times—when you dig back a year you can't exactly lay your hands on it but to the point that in the business of handling sugar was bulk, tremendous low profit such as there was in the—certainly wasn't a very great business. [48]

(Testimony of Eli Olsen)

Q. By Mr. Bell: Who said that?

A. Mr. Fly.

Q. Do you recall anything further that Mr. Fly said to you?

A. Exactly and precisely possibly there could have been.

Mr. Bell: No further questions.

Mr. Carr: At this time I move to strike all the testimony of this witness on the ground that it does not prove or disprove any issue in the case. My second ground is that it was offered, apparently, for the purpose of proving similar incidents and it is not sufficiently connected up or relevant to prove that particular phase and I move to strike all of his testimony. I think it is prejudicial in its present state.

The Court: If I felt this testimony tended to show similar transactions I would allow the testimony to remain but instruct the jury that it goes only to intent because the offenses under the first seven counts have to be done willfully and knowingly and anything that goes to prove intent is admissible, but I do not think it is sufficiently connected to indicate anything but general palaver and was not even a conversation.

I will strike the testimony and instruct the jury to disregard it. Call your next witness. [49]

Mr. Bell: Mr. Eltinge.

V. N. ELTINGE,

called as a witness on behalf of the Plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: V. N. Eltinge.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Eltinge?

A. Branch manager of the Bank of America at Santa Monica and Vermont.

Q. How long has that been your occupation?

A. Since January, 1942.

Q. Have you made a search of the records of your bank to ascertain whether or not there is an account or, during 1946 there was an account for sugar under the name of the Italian-American Import Company?

A. Yes.

Q. Did you find such an account in your bank?

A. No.

Q. Have you checked the files and records of your bank to ascertain whether or not there is a sugar ration—whether there was a sugar ration banking account in your [50] branch under the name of James M. Fly?

A. Yes, sir.

Q. Was there such an account? A. No.

Q. I exhibit to you Government's Exhibits 1 to 12 inclusive and call your attention to the check which constitutes portions of those exhibits. Have you see those checks before, Mr. Eltinge? A. Yes, sir, I have.

Q. Where did you see them before?

A. Well, I saw them in the bank there. Mr. Taylor brought them in.

(Testimony of V. N. Eltinge)

Q. At your bank at Santa Monica and Vermont?

A. Yes, sir.

Q. When you say Mr. Taylor brought them in, did he bring them into your office or bring them into the bank?

A. No, they were brought to my attention. They were in the bank.

Q. They were in the bank?

A. Came through, yes.

Q. Did you obtain them from the files there or did somebody else obtain them?

A. Well, they were from our files in the bank.

Q. Do you know of your own knowledge who got them from your files? [51]

A. Well, I don't really recall whether I picked them out or one of my assistants.

Q. Did you turn them over to somebody?

A. Yes. I turned them over to Mr. Taylor.

Q. Mr. Eltinge, did you also search the files to ascertain whether or not there was a sugar ration banking account in the name of the Italian-American Delicatessen Company?

A. Yes, sir.

Q. And did you find such an account? A. Yes.

Q. Do you know a man by the name of Fred Peterson?

A. Yes, sir.

Q. Did he ever work for you? A. Yes, sir.

Q. What was his position in your bank?

A. He was assistant cashier and chief clerk.

Q. Did you know a man by the name of Gordon Smith?

A. Yes, sir.

Q. Did he work for you? A. Yes, sir.

(Testimony of V. N. Eltinge)

Q. What was his position?

A. The same. He took Peterson's place.

Q. Did those men work for you during 1946?

A. Yes, sir. [52]

Q. You said that Mr. Smith took Mr. Peterson's place. Did they ever work in the bank at the same time?

A. Yes, they did.

Q. When did Mr. Peterson leave the bank entirely or did he just transfer in some way?

A. Mr. Peterson was there and resigned and then we gave Gordon Smith his position there.

Q. Do you recall the approximate date that took place?

A. That was in—I have a record of it here if I may look at it.

Q. To refresh your memory?

A. Yes. Peterson resigned on September 30, 1946. At that time Gordon Smith took over his position.

Mr. Bell: That is all, you may cross examine.

Cross Examination

By Mr. Carr:

Q. Mr. Eltinge, how long have you known Mr. Fly?

A. Oh, I have known Mr. Fly—I couldn't say exactly.

Q. Well, approximately will do.

A. Three or four years, I believe.

Q. He banks at your bank, does he not?

A. He did.

Q. And used to be in and out of there quite a bit?

A. Yes. [53]

(Testimony of V. N. Eltinge)

Q. Depositing money, taking money out and probably even borrowing money, wasn't he, from time to time?

A. Yes. He didn't borrow any from me but he had from other branches, I believe.

Q. And as a matter of fact—first I will ask you this: Have you ever been over to his place of business at 4356—let me see if I have that right, 4356 Sunset?

A. Yes.

Q. And approximately how many times have you been in that place of business?

A. Oh, once or twice, I believe.

Q. You knew that that place was being operated by James Fly as sole proprietor, did you not?

A. Yes, sir.

Q. Have you ever been over to his place on Santa Monica, 8279?

A. No—well, I went there one night to look for Peterson and that was the only time I was in there. That was after—that was about 7:00 o'clock at night. Something came up I wanted to talk to Peterson about.

Q. Now, the address at 4356 Sunset you recall has on the outside: "Italian-American Delicatessen"?

A. Yes.

Q. And as a matter of fact Mr. Fly had an account, a ration account there for a considerable period of time, [54] didn't he, prior to 1946?

A. Yes, sir.

Q. And you know of your own knowledge, that some of those checks were labeled—I should not say "labeled" but signed "American Delicatessen" by James M. Fly and they were cashed, weren't they?

A. Yes, sir.

Q. And on this same account we have been referring to?

A. Yes.

(Testimony of V. N. Eltinge)

Q. But the account was not carried in the name of the Italian-American Import Company?

A. That is right.

Q. You knew, of course, that James Fly owned both of those businesses, is that correct? A. Yes, sir.

Q. And as a matter of fact if he had had in that account, Mr. Eltinge, sufficient ration credit those checks would have been cashed, is that right?

A. Well, I think if I may say this, that was a mistake of the bookkeeper to ever pay those checks signed that [55] way.

Q. But they were paid?

A. They were paid, yes.

Q. Now, if the checks had come in Italian-American Import Company signed by James M. Fly and there had been sufficient credit in the bank, ration credits, they would have been cashed, wouldn't they?

A. I would not have cashed them but I didn't know about it.

Q. They were being cashed under those circumstances? A. Yes.

Q. You don't have with you, do you, the ration deposit account, the papers that were taken from the bank?

A. No. What few we could find were turned over to Mr. Taylor. They were destroyed, the records that we hunted for.

Q. Who destroyed the records?

A. Well, I don't like to say but they were evidently destroyed.

Q. Well, I don't think there is any great sin about telling us, Mr. Eltinge. I think it might help throw some light on the case.

(Testimony of V. N. Eltinge)

The Court: That is if you know.

The Witness: Well, I have my reasons to believe but I have no actual knowledge that they were destroyed. [56]

Q. By Mr. Carr: If you have no actual knowledge I don't want you to speculate. Could you estimate—did you see the account before it was destroyed?

A. Yes; I had seen it at various times.

Q. And could you tell me whether or not it had a balance in it at the time it was destroyed?

A. Well, just what do you mean by that?

Q. Well, I mean he had credit—in other words a credit could have been issued on the account?

Mr. Bell: Is this account of the delicatessen?

Mr. Carr: This is James M. Fly. I am not particular whether it is the delicatessen or American Import or whatever it is so long as we are talking about the account on which James M. Fly drew checks.

A. Dell, on November 30 approximately, at the time we found out this business, there was 1,330 pounds on the account.

Q. And at the time it was destroyed I assume that would be the same situation?

A. Well, the records and the checks for approximately a year—way back, had been destroyed so we wouldn't check back.

Q. The last time you saw—first let me ask you this. What papers would have been in the hands of the bank prior to the time they were taken away? You would have a signature [57] card?

A. Yes, signature card, ledger sheets.

Q. And cancelled checks? A. That is right.

(Testimony of V. N. Eltinge)

Q. Now, to whom did you give the cancelled checks?

A. They would be held out but they were taken from our records, the cancelled checks.

Q. By whom?

A. Well, by one of the employees.

Q. By one of your employees?

A. That is right.

Q. Well, now, what happened then to the ledger sheet? A. They also disappeared.

Q. Didn't the OPA come over there and pick up the papers, agents of the OPA, a Mr. Foster and Mr. Taylor or somebody from the OPA?

A. Mr. Taylor was around but the record we could find were only a few of what we should have had.

Q. Well, what records did Mr. Taylor take away with him? That is what I am getting at.

A. Well, he got one ledger sheet, I believe, and he got a number of other sheets as well.

Q. Do you have the ledger sheet, counsel?

Mr. Bell: No. What happened was this. This was taken over by the Department of Agriculture when the OPA went out [58] of existence, and we have been trying all day to get the documents so we can use them, but they have been mislaid somewhere.

Mr. Carr: That is as bad as when the Supreme Court was having the argument and the rule was in the pocket of a marshall in Texas and they couldn't find it. I ask this witness be excused subject to recall.

Mr. Bell: That is quite all right with us. We are still endeavoring to get those records from the Department of Agriculture.

The Court: All right, call your next witness.

Mr. Bell: Those documents also have a bearing on the testimony of the next witness and if we find them I would like to have the witness come back tomorrow so he can talk about those records.

The Court: All right.

Mr. Bell: Mr. Carle.

JACKSON T. CARLE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jackson T. Carle. [59]

Direct Examination

By Mr. Bell:

Q. During 1946, Mr. Carle, what was your occupation?

A. I was employed by the Office of Price Administration and subsequently by the sugar rationing administration as branch director for Southern California and Arizona.

Q. In connection with sugar what were your duties?

A. My duties were to generally supervise and direct the administration of the sugar rationing program in this area.

Q. Did you have anything to do with the registration of persons seeking sugar allotments?

A. Yes. The branch office here received registrations and kept them on file, authorized the opening of ration bank accounts; determined allotment inventories and so on.

Q. Did you have under your custody all the registrations in this area of people authorized to have ration bank accounts?

A. Yes.

(Testimony of Jackson T. Carle)

Q. Did you make a search of your records under your control to ascertain if there was a registration in the name of the Italian-Import Company? A. I did.

Q. Did you ascertain whether or not there was such [60] a registration?

A. There was no such registration for the Italian-American Import Company either as an authorized dealer or consumer of sugar or for bank account.

Q. Did you make a search of your records to determine whether or not there was such a registration in the name of James M. Fly?

A. There was a registration in the name of James M. Fly doing business as the Italian-American Delicatessen in the 4300 block on Sunset Boulevard. [61]

Q. Was there any in his own name other than that?

A. No.

Q. Do you know where that particular set of records is now?

A. The sugar branch office turned those records over to the division of special investigation of the sugar rationing administration.

Q. And is that agency now in existence?

A. No; the sugar branch office was closed on July 7th of this year and sometime subsequent to that, around the end of July, the division of special investigation was also closed down.

Q. And do you know where those records went to from there?

A. I don't know where this particular record went to. The records in general of pending cases were turned over to the alcohol tax unit.

(Testimony of Jackson T. Carle)

Q. That is the Treasury Department?

A. Yes, sir. I am sorry, I said Agricultural Department, Mr. Carr. May I amplify that a little? The general registration records were turned over to the Department of Agriculture; pending cases were turned over to the alcohol tax unit.

Mr. Bell: Then I wasn't so far wrong after all. Now, rather than ask this man to testify what he remembers this [62] document to contain I am going to ask that he be recalled tomorrow in the event those documents are found.

The Court: All right.

Mr. Carr: Do you want me to cross-examine him now?

Mr. Bell: Whatever you wish.

Cross-Examination

By Mr. Carr:

Q. I take it, sir, you would be considered an expert on matters of the OPA relating to sugar, is that right?

A. I have some knowledge of the machinery of sugar rationing, yes.

Q. And you were familiar with the machinery and how it did work at that time, say in 1946?

A. Yes, sir.

Q. Now, calling on your knowledge as an expert let us ask you this question: You say Mr. Fly was registered and that the Italian-American Delicatessen Company was registered. Now, your records would show that his account was at the branch of the—at the Santa Monica and Vermont Avenue Branch of the Bank of America, is that right?

A. The records show where the account was, yes.

(Testimony of Jackson T. Carle)

Q. Well, you know that in this case that was the place where the account was, don't you?

A. Not to my present knowledge, no.

Q. Then the records or the registration would show [63] his business address, is that right? A. Yes.

Q. Now, if a check were presented to that bank and it was written by James M. Fly and it came from his business address isn't it a fact that under normal operations the bank cashed all of those checks although the name of the concern might have been slightly different? For instance in one case it might be the Italian-American Delicatessen and in the other case it might be the Italian-American Import Company?

A. No, that is not true.

Q. They would not do that? A. No.

Q. Did you know that just prior to your taking the witness stand the branch manager of the bank said that they were actually cashing checks under those circumstances?

Mr. Bell: Objected to as calling for the conclusion of the witness.

The Court: And furthermore, I don't think that states the answer of the witness fairly. The witness said that the bookkeeper did it but they had no business doing it. You remember that?

Mr. Carr: That is the point in this case. The point is that they didn't mean to but they did it.

Q. Isn't it a fact, Mr. Witness, that in many, many [64] instances, with the knowledge of the officials of the OPA, that where a man is the sole proprietor and using a trade name, that checks were actually cashed to your

(Testimony of Jackson T. Carle)

knowledge and nothing was done about it, although the name of the concern was not accurate?

A. That is not a fact.

Q. It is not a fact? A. No, sir.

Q. Now, what was the balance, if you know, in that account when it was closed? A. I don't know.

Q. Have you any way of finding out?

A. No, I have no way of finding out now. I think the bank could give me the answer to that.

Q. Well, I will show you a letter here and I will ask this be marked for identification as Defendant's Exhibit 1. I think it is a registered letter. Probably the envelope and the interior should be marked as separate exhibits.

The Clerk: Defendant's Exhibits 1 and 2, for identification.

(The documents referred to were marked as Defendant's Exhibits 1 and 2 for identification.)

Q. By Mr. Carr: Mr. Witness, I will show you here first Defendant's Exhibits 1 and 2, which is an envelope [65] marked "Registered, 973509," with a United States postage stamp on it and on the left-hand corner it says: "Office of Price Administration, Postoffice Box No. 3549, Terminal Annex, Los Angeles 54, California. That was your postoffice box, was it not? A. Yes, sir.

Q. It says, "Official Business." If undeliverable as addressed please return to sender. You recognize that as one of your envelopes, do you not?

A. Yes, sir. [66]

Mr. Carr: Do you raise any question about that, counsel? Do I have to lay the foundation?

Mr. Bell: I won't raise any question about the fact the letter is drawn from the envelope.

(Testimony of Jackson T. Carle)

Q. By Mr. Carr: I show you then Defendant's Exhibit A-1, which is the enclosure in that envelope and you will note that at the top it says "Office of Temporary Controls, Office of Price Administration, Los Angeles, Sugar Branch. P. O. Box 30549, Terminal Annex, Los Angeles 54, California." That was the way your letters of this type were headed, is that right?

A. That is right.

Q. Do you recognize this as one of your letters?

A. Yes, sir.

Q. Now, in that connection you will note it is addressed to the Italian-American Delicatessen, 4356 Sunset Boulevard, Los Angeles, California, dated February 10, 1947.

Mr. Bell: Just a moment. I will object to the further reading of any contents until it is offered in evidence.

Mr. Carr: Well, I will offer it in evidence at this time, your Honor, both exhibits.

Mr. Bell: And I will object to it as being beyond the scope of the direct examination and as incompetent, irrelevant, and immaterial. [67]

The Court: I do not think sufficient foundation has been laid to warrant the introduction of this letter—not in the sense it didn't originate from the OPA but in the sense that the American-Delicatessen had an account.

Mr. Carr: Your Honor, he testified relating to whether or not they had an account and he says he doesn't know what the balance is. I am taking what he has admitted to be one of the official records of the OPA—he admitted it was sent by the OPA. Now, I am offering it to show what the balance in that account was by the very letter which came from the OPA.

(Testimony of Jackson T. Carle)

Mr. Bell: There is no foundation showing this man had anything to do with it or that it reached the defendant or anything of the sort.

The Court: I think for the present I will sustain the objection. Later on in the light of any additional testimony I might change my ruling.

Mr. Carr: Well, I would like to lay a little bit of foundation then to be sure before I make the offer.

Q. By Mr. Carr: Did I understand you, sir, to say that Exhibit A-1, Defendant's Exhibit A-1 you recognize to be a letter which was sent from the OPA—Office of Temporary Controls, rather, the successor of the Office of Price Administration, to the Italian-American Delicatessen at 4356 Sunset Boulevard? [68]

A. I recognize the letter in question as being a form letter which was sent by the branch office in cases involving the closing of accounts because of overdrafts.

Q. And from your experience and knowledge of the operation of the OPA and the Office of Temporary Controls, you know that this is the type of letter that was sent out to close accounts? A. Yes, sir.

Mr. Carr: I offer it, your Honor, in evidence, both the exhibits, Exhibit 1-A and 2-A.

Mr. Bell: I renew my objection on all grounds.

The Court: Well, the ruling will stand. You may renew your offer later.

Q. By Mr. Carr: Now, I will show you Defendant's Exhibit A-1 and ask you if you can look at that and refresh your recollection and tell me what the balance was in the account, of the American-Delicatessen—Italian-American Delicatessen at 4356 Sunset Boulevard on April 10, 1947?

(Testimony of Jackson T. Carle)

Mr. Bell: Object to it as incompetent, irrelevant and immaterial, what the American-Italian Delicatessen Company had in its account. That is not the charge at all. It is the checks drawn on the import company.

Mr. Carr: Our position simply is this. Mr. Fly, the evidence has shown, is the sole proprietor of one or the other, if there were two, and as such the evidence is [69] admissible to show whether or not he had an account. Your Honor, the allegations in the indictment are that there was no such account, either Fly or the other account, and certainly we cannot preclude a defendant from showing that he actually had an account. The testimony has shown, whether it be right or wrong, that the bank was cashing the checks written on the Italian-American Delicatessen and the mere slip of a finger or the use of a different name should not condemn a man for eternity. He should have a chance to show that.

Mr. Bell: I do not believe that is a correct statement of the evidence. The questions put on that score was what certain individuals dealt with him as or understood him to be.

The Court: I think while in some respects it is a little out of order, I will leave the testimony that the man had an account, actually had an account under a different name.

Let us get away from this case for a moment and illustrate the situation a little differently. The jurors will understand anything I say is not a comment on the facts. I never comment on the facts, but whenever a point is made I believe it is the duty of the court not merely to rule on it but to tell the basis for the ruling. Sometimes I am able to convince counsel that my ruling is right and

(Testimony of Jackson T. Carle)

they [70] conform to it and sometimes they convince me that I am wrong.

Let us illustrate here. It is one thing for a man to give a check on the bank where he has no account and it is another thing to give a check on a bank where he does have an account but uses the wrong name. Supposing it is a partnership account and he uses his individual name. In the one case the inference of intent would be absolute because a man is supposed to know whether he has an account or not. In the other case there is an inference of acting in good faith that can easily be drawn because the man may just have made a mistake. Certainly if he had an account he could draw against it. It is a question for the jury to determine whether the mistake was deliberate in order to secure additional sugar or the result of a mistake. The law does not punish mistakes in any instance and I believe that any testimony which would show that at the time these checks were drawn he actually had an account, if connected up, may bear upon the intent when the other name was used.

That is one of the fundamentals in a proceeding of this character. You have to show it was willful and knowingly done. You know the definition I usually give of willfulness and willingly done. Therefore good faith or bad faith is material and the defense against bad faith is just as broad as the attack on it. In fact it is narrower. If the defendant succeeds in convincing the jury or raises a [71] reasonable doubt in the juror's mind as to whether this was a deliberate attempt to get advantages to which he was not entitled, to get additional sugar to which he was not entitled and was the result of a mistake and that he did not gain or profit by it because he had plenty of

(Testimony of Jackson T. Carle)

sugar under another name, it is up to the jury then to apply the doctrine of reasonable doubt. The defendant does not have to prove that beyond a reasonable doubt or even by a preponderance of the evidence. I am not saying that this has that effect. I am merely saying it bears upon that point. What weight is to be given it is for the jury to determine in the light of the entire record—the entire evidence.

Mr. Carr: I was merely asking him if he could refresh his recollection from that Exhibit A-1 and from that tell what the balance was in the account on February 10, 1947.

The Court: You may answer that question.

The Witness: This form letter addressed to the Italian-American Delicatessen would indicate that the account was closed on February 5 because of a prior overdraft, because checks had been written against it in excess of the balance in the bank, but by the time the closing came up it showed a credit balance of 1,490 pounds.

Mr. Carr: That is all. I would like to offer these. I believe your Honor has sustained the objection on the offer for the moment. That is all for the present. I have no [72] further examination.

Mr. Bell: I have further examination but I would like to see if we can get the documents first and we would like to have this witness recalled tomorrow morning.

The Court: All right. Gentlemen, we have reached the end of the day. We have worked long hours and this is a good stopping point. You are moving along very fast.

Ladies and gentlemen of the jury, we are about to take an adjournment until 10:00 o'clock tomorrow morning. The court admonishes you not to converse among your-

(Testimony of Jackson T. Carle)

selves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon until the cause is finally submitted to you.

When you return in the morning you will go to the jury room and remain there until called by the bailiff.

I try to get on the bench promptly but I am acting in three different capacities at the present time. I am trying criminal cases, I am also in charge of the criminal department and I am also acting as senior judge in the absence of Judge McCormick. The result is that all sorts of things are coming up that need action. That is a part of my work and rather than have people wait until I am off the bench, especially when it relates to the liberty of an individual, whether he should be admitted to bail or not or revocation of probation, I have to take the time to hear them when all the parties are [73] present.

I want to impress upon you in this and in other cases, it is of the utmost importance to keep an open mind as to the facts in the case. You have already heard some of the testimony on behalf of the plaintiff. An entirely different interpretation of that testimony may be had after the defendant has produced his witnesses. That being true you will have to then decide, if a conflict arises between the testimony of various witnesses, which version you are to believe. It is a matter entirely up to the jury, a matter which I have nothing to do with except to give you certain rules by which to judge the credibility of witnesses.

With that admonition in mind we will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:45 o'clock p. m., a recess was had until 10:00 o'clock a. m. of the next day, Wednesday, September 24, 1947.) [74]

Los Angeles, California, Wednesday, September 24, 1947,
10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: United States of America versus James M. Fly.

Mr. Carr: Defendant is ready.

Mr. Bell: The Government is ready, your Honor.

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel. You may proceed, gentlemen.

Mr. Bell: May it be stipulated the jury is here?

The Court: I have already said that. You did not hear me.

Mr. Bell: I am sorry, your Honor.

The Court: Call your next witness.

Mr. Bell: Mr. Tingle.

BENJAMIN H. TINGLE,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Benjamin H. Tingle.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Tingle? [78]

A. I am an investigator with the Alcohol Tax Unit, Internal Revenue Bureau.

Q. In that capacity were you given custody or possession of any documents from the Office of Price Administration, the Sugar Control Branch?

A. Yes, sir; we took custody of those.

(Testimony of Benjamin H. Tingle)

Q. Were you given custody of any documents and records pertaining to a person by the name of James M. Fly?

A. Yes, sir. We took over the files, all the files from that office in which that case was included.

Q. Are those files and records in your possession now?

A. Well, we have the regular file, the regular case file in that case but we were unable to find the file containing the exhibits in that case.

Q. Have you made a search of your office for those records? A. We have.

Q. What has been the extent of your search?

A. We made a thorough search of all our records and files. We have been unable to find them.

Q. Did you do anything further?

A. We also telephoned our San Francisco office to make a further search for the case and we were told that they would make such a search and let us know about it.

Q. Have you received any communication from them? [79]

A. No. They told us if they found any records—

Mr. Carr: I can't hear you, Mr. Witness.

A. They told me if they found the records they would send them to us special delivery today.

Q. By Mr. Bell: Did you make any personal examination of the contents of the exhibit file?

A. No, I did not.

Mr. Bell: That is all.

Mr. Carr: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Taylor, will you take the stand?

LAWRENCE M. TAYLOR,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Lawrence M. Taylor.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Taylor?

A. At the present time I am a salesman.

Mr. Carr: I don't know, but there is something about this position over here that makes it impossible for me to hear the witness. I have good ears, your Honor. I can usually hear my wife talk a mile away but I can't hear these [80] witnesses.

The Court: We all do that.

Q. By Mr. Bell: Were you at one time associated or employed by the Office of Price Administration?

A. Yes, sir.

Q. In what capacity? A. Special agent.

Q. During what period of time were you so employed?

A. July 1945 to July 1947.

Q. Among your assignments did you investigate Mr. Fly? A. Yes, sir.

Q. In the course of that investigation did you pick up and collect documents and exhibits of various sorts?

A. Yes, sir.

Q. Will you describe briefly the exhibits you picked up?

A. Well, we had checks that had been cleared through the bank that we received from the bank.

(Testimony of Lawrence M. Taylor)

Q. Which bank?

A. Bank of America, Santa Monica and Vermont Branch.

Q. Did you see Mr. Eltinge there? A. Yes, sir.

Q. Did you see Mr. Snodgress there?

A. Yes. [81]

Q. What else did you pick up?

A. We have statements of all types from different people that we contacted regarding the case.

Q. Did you put into your exhibit file any registration statements of the Office of Price Administration?

A. Yes, sir; the original—all of the original applications and orders that were issued to and for the Italian-American Delicatessen.

Q. And were these the records which had been on file in Mr. Carle's office? A. Yes, sir.

Q. After you picked them up what did you do with those documents?

A. They were initialed and put in a safe in our office, in an envelope, a large Manila envelope which was bound with a rubber band and then it was sealed with Scotch tape on the outside with my initials on them.

Q. What was the last date on which you saw that exhibit file? A. July 23rd, 1947.

Q. How do you fix that date?

A. Because that was the last day I worked for the Agricultural Department. I went through the files at that time.

Q. By that time the Agricultural Department had taken [82] over your unit? A. Yes, sir.

Mr. Bell: I believe that is all of this witness.

The Court: Cross examine.

(Testimony of Lawrence M. Taylor)

Cross-Examination

By Mr. Carr:

Q. Who are you working for now?

A. The Lanser Company.

Q. You are not with the Government any more?

A. No, sir.

Q. When did you leave the Agricultural Department?

A. July 23rd, 1947.

Q. When did you leave the OPA?

A. At the end of the time that the Agricultural Department took over the office of temporary controls.

Q. As I understand it, the office of temporary controls took over OPA and office of temporary controls was taken over by the Agricultural Department and now you are back in private business? A. Yes, sir.

Mr. Carr: That is all.

Mr. Bell: In view of our inability to produce these documents I think we had better proceed on the basis of secondary evidence of them, your Honor, so I will call Mr. Eltinge back to the stand. [83]

V. N. ELTINGE,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Bell:

Q. You have heretofore been sworn in this case?

A. Yes, sir.

Q. Mr. Eltinge, yesterday you were testifying as to the records in your bank concerning the account of Mr.

(Testimony of V. N. Eltinge)

Fly. I believe you stated that you had an account in your branch bank under the name of Italian-American Delicatessen Company, is that right? A. Yes, sir.

Q. Do you now have the signature card for that account in your possession?

A. I am not positive of that. Mr. Snodgress may have that with his papers.

Mr. Bell: That makes it necessary for me to call Mr. Snodgress. I will have to recall this witness again, your Honor. Will you call Mr. Snodgress?

The Court: All right, you may stay in the room.

Mr. Bell: Your Honor, while we are waiting for this witness may I hand the court a decision which I would like to have your Honor read when you get a moment because I am going [84] to refer to it. It may save time. It is 160 Fed. (2d) 259.

The Court: All right.

Mr. Bell: I want to ask Mr. Eltinge one more question.

The Court: Very well.

Q. By Mr. Bell: Mr. Eltinge, do you know whether or not that document is in your possession or in the possession of your bank.

Mr. Carr: I can't hear you, Mr. Bell.

Q. By Mr. Bell: Do you know whether the signature card is in your possession or the possession of your bank at the present time? A. It is not.

Q. Do you know where it is?

A. It was given to Mr. Taylor along with the other papers.

(Testimony of V. N. Eltinge)

Q. Did you see the signature card when it was in the possession of your bank? A. Yes, sir.

Q. Will you describe how the signature card appeared?

A. It was made out to the Italian-American Delicatessen by James Fly, I believe, or Jimmy Fly.

Q. Do you recall whether there was just Mr. Fly on it or whether anybody else had authority to sign?

A. No one else that I know of had authority to sign on there. [85]

Mr. Bell: That is all.

Mr. Carr: Just a moment, Mr. Eltinge.

Cross Examination

By Mr. Carr:

Q. You are the manager of the bank there, aren't you?

A. Yes.

Q. What if anything did you have to do with ration accounts? A. Beg your pardon?

Q. What if anything did you have to do with ration accounts there at the bank?

A. I opened up a great many of them.

Q. You didn't do that personally, did you?

A. Yes, I did.

Q. You handled those personally?

A. Yes, sir, we had to. We were short of help during the war and it necessitated me doing lots,—lots of things.

Q. Did you personally open the account for Mr. Fly?

A. No, I did not.

Q. Are you quite sure that you saw the signature card that Mr. Fly signed? A. Yes, I did.

(Testimony of V. N. Eltinge)

Q. When?

A. When Mr. Taylor was out we checked everything.

Q. And you looked yourself at the card? [86]

A. Oh, yes.

Q. Have you checked since Mr. Taylor left to find out if any of the records might have been left inadvertently?

A. Yes, sir, we have.

Q. And you can't find a thing?

A. No further records.

Q. I take it the only thing you ever saw in connection with Mr. Fly's account was the signature card?

A. No. We have, I beg your pardon, we have copies of ledger sheets and other copies. Mr. Snodgress has them here now.

Q. You have copies of them?

A. Certified copies.

Q. Of some of the material you gave to Mr. Taylor?

A. That is right.

Q. What do you mean by "certified?" Certified by whom?

A. Certified as correct.

Q. By whom?

A. By one of the officers of the bank.

Q. You mean from their recollection?

A. Not from recollection, no. They were made up at the time these papers were given to Mr. Taylor.

Q. In other words, you keep a duplicate copy?

A. That is correct. [87]

Q. So you should have a duplicate copy of everything?

A. Everything that we gave Mr. Taylor, yes.

Q. That is fine; that is all.

Mr. Bell: No further questions. Now, Mr. Snodgress.

RICHARD C. SNODGRESS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Richard C. Snodgress.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Snodgress?

A. I am assistant cashier and chief clerk of the Santa-Monica-Vermont Branch of the Bank of America.

Q. Will you keep your voice up?

A. Assistant cashier and chief clerk of the Santa Monica and Vermont Branch of the Bank of America.

Q. How long has that been your occupation?

A. I have been at that branch since December 16th of 1946.

Q. In connection with your duties there did you encounter Mr. Taylor of the OPA? A. Yes, sir.

Q. Did you turn over any documents to him? [88]

A. Yes, I did, sir.

Q. When you turned over the documents to him did you make or cause to be made any duplicates or copies thereof? A. Yes, I did, sir.

Q. Have you checked the files of the branch bank there of the Bank of America, to ascertain if those duplicates were there? A. Yes, sir.

Q. Have you found any ledger sheets of the Italian-American Delicatessen Company?

A. Yes, sir, I have.

(Testimony of Richard C. Snodgress)

Q. Do you have those with you?

A. Yes, sir, I do.

Q. May I see the ledger sheets, please?

Mr. Bell: The witness hands me three ledger sheets which I would like to have the clerk mark for identification as one number.

The Clerk: Government's Exhibit 13 for identification.

(The document referred to was marked as Plaintiff's Exhibit 13, for identification.)

Q. By Mr. Bell: Not being an accountant, Mr. Snodgress, I would like to have you explain what these various entries are. On the first page there appears a group—

Mr. Carr: I will object to that until a better foundation [89] is laid and the thing is identified.

Mr. Bell: Well, we will offer it in evidence.

Mr. Carr: I object to it on the ground, first of all, it has matter on the face of the first page that is written on there which is a conclusion and which is prejudicial or might be prejudicial. Upon the further ground that it is not yet proved that this is an absolutely accurate copy. There seems to be some handwriting. There are several marks on it. It appears to have been added to and there are brackets around certain figures. And on the further ground that the foundation has not been properly laid.

Mr. Bell: That was the process I was trying to bring out when counsel interrupted me.

The Court: Go ahead.

(Testimony of Richard C. Snodgress)

Q. By Mr. Bell: Did you compare the copy here with the documents that you turned over to Mr. Taylor? A. This, sir, is the original sheet.

Q. You are pointing to the first sheet?

A. This first sheet.

Q. The first sheet is a duplicate original?

A. No, this is an original sheet. This posting was actually done on this sheet. This is the original. I posted this top sheet.

Q. By Mr. Bell: The whole sheet or just a portion of the sheet? [90]

A. This down to this point.

Q. You are pointing down to the bottom of that top pencilled bracket there? A. That is right.

Q. Some figures inside of a rectangle and you are pointing to the bottom line of that rectangle?

A. Yes, sir.

Q. Down to that point it is the original sheet?

A. Yes, sir.

Q. Now, will you describe what the other figures here represent? I am pointing to the lower half of the sheet and the two left-hand columns.

A. These two columns are where the amounts of the checks which were deducted in the upper part of the sheet have been added back to the ledger.

Q. And this typewritten material in the lower right-hand portion, was that written at the time that you turned the material over to Mr. Taylor?

A. Yes, sir. I typed that on there myself.

(Testimony of Richard C. Snodgrass)

Q. Now, calling your attention to the second sheet, are those original entries or are those copies of the documents that you gave to Mr. Taylor?

A. That is a duplicate of the previous ledger—the ledger that was previous to this one, you see.

Q. The second sheet is a sheet which was previous to sheet No. 1, is that right? Is that what you mean to say? [91]

A. That is right. This is the copy. This is a copy of the ledger which was previous to this one.

Q. And the third page, what does that represent?

A. This is the account, the ledger of the account subsequent to the first sheet.

Q. So the regular order should be—the middle sheet is No. 1, the top sheet is No. 2 and this sheet is No. 3?

A. Yes, that is correct.

Q. Now, except for the first half of the—strike that. When you say this middle page is a duplicate you mean that is a carbon copy made at the time of the original or was it made subsequently?

A. That would be made subsequently according to this statement here—a certified copy.

Mr. Carr: I object to that answer. We are asking for his knowledge and not according to the statement.

Q. By Mr. Bell: Did you compare—

Mr. Carr: I move that be stricken.

The Court: It may be stricken.

Q. By Mr. Bell: Did you compare the middle sheet here with any of the documents you gave to Mr. Taylor?

A. This particular sheet I don't think I had anything to do with.

(Testimony of Richard C. Snodgress)

Q. Where it says "Certified copy," is that Mr. Eltinge?

A. That is Mr. Eltinge's signature. [92]

Q. Now, as to the third sheet. Did you compare that with any document that you gave Mr. Taylor?

A. No. This sheet was retained. This is an original sheet which was retained in our file. It was not given to Mr. Taylor.

Q. So the top sheet and the bottom sheet were not given to Mr. Taylor, is that right? A. That is right.

Q. And these are not copies but they are originals or what you call originals? A. Yes, sir.

Q. And the middle sheet is one that you are not certain about, is that correct?

A. That would be a copy.

Mr. Bell: Before going further, because I wish to offer this into evidence, I would like to call Mr. Taylor to testify to the court sheet.

The Court: Very well.

LAWRENCE M. TAYLOR,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Bell:

Q. You have already been sworn, Mr. Taylor? [93]

A. Yes, sir.

Q. I believe you testified that you picked up some documents from Mr. Eltinge and Mr. Snodgress at the Bank of America? A. Yes, sir.

(Testimony of Lawrence M. Taylor)

Q. I show you the second page of Government's Exhibit 13 for identification, upon which appears the signature L. M. Taylor. A. That is my signature.

Q. Did you receive a copy of that document?

A. Yes, sir.

Q. Did you compare the copy that you received with the document that appears here? A. Yes, sir.

Q. The document that you received was original in form, was it? A. Yes, sir.

Q. At the time and before taking it away and while both were present you compared them, is that right?

A. Yes, sir.

Q. At the time and before taking it away and while both were present you compared them, is that right?

A. Yes, sir.

Q. Did they correspond in all respects?

A. Yes, including the pencil marks on the sheet.

Q. Now, which pencil marks do you refer to?

A. These here.

Q. You are indicating some pencil marks under the [94] column "old balance" and the column "new balance"? A. Yes, sir.

Mr. Bell: That is all from Mr. Taylor.

Mr. Carr: Should I cross-examine him? I am coming and going here, your Honor.

The Court: Let him complete his direct examination.

Mr. Carr: I will be in the wrong courtroom in a few minutes the way it is going. Shall I wait until he is recalled?

The Court: Yes, I think so.

Mr. Bell: You can step down at this time, Mr. Taylor. Mr. Snodgrass, will you resume the stand?

RICHARD C. SNODGRESS,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Bell:

Q. Now, as to these documents which we have been describing here and talking about, Exhibit 13, were those records made and kept in the regular course of your business? A. Yes, sir.

Q. And was it the regular course of your business to make and keep such records? A. Yes, sir. [95]

Q. Was it the regular course of your business to make and keep such records at or near the time of the transaction they purport to reflect? A. Yes, sir.

Mr. Bell: Government's Exhibit 13 is offered in evidence.

Mr. Carr: I would like, before I make an objection, to ask him a few questions on voir dire.

The Court: All right.

Cross-Examination

By Mr. Carr:

Q. You were not working at the bank at the time these records were made, were you?

A. I was working at the bank from about the middle of the first page on.

Q. About the middle of the first page on?

A. Yes.

Q. Now, let us get that exactly.

A. All right. I went to work at the bank on December 16th. This posting from this point on, was done after I was at the bank.

(Testimony of Richard C. Snodgrass)

Q. From about where? Where it says—the first figure, \$2500.00?

A. Yes, that is correct, sir.

Q. The rest of the postings you were at the bank when [96] done? A. Yes, sir.

Q. Now, how about page 2? Were you there when that was done?

A. To my knowledge, no. I don't know.

Q. How about page 3? Were you there when that was done? A. Yes, sir.

Q. So, part of page 1 you were not there and page 2 you were not there, and you think you were there on page 3? A. I know I was there on page 3.

Q. All right, you know you were there. Now, these figures are of a lighter hue than the later ones?

A. That is right.

Q. Which shows, according to your testimony, they were treated as original—that was an original up to about half of the page?

A. That is right, sir, but the hue of the type does not—isn't what decides that.

Q. What does decide whether half of the page is original and half is duplicate?

A. Because this part—this is not so much of a duplicate as it is a correction of the posting up here. You see, this is the original posting. This is a reversal of [97] that posting.

Q. This reversal came about after you talked to Mr. Taylor, didn't it? A. Yes, sir.

(Testimony of Richard C. Snodgrass)

Q. And you wrote this writing on there after you had a discussion with Mr. Taylor?

A. That is right, sir. I talked to him before I did that.

Q. So this writing on here is not a part of your ordinary books and records at all? It is just something you put on after Mr. Taylor came in and talked to you?

A. No, sir. I put that on there when I made this correction because in—

Q. Now—

Mr. Bell: Let him answer the question.

Mr. Carr: Just a moment, counsel. I submit your Honor—well, go ahead.

The Witness: Well, what I wanted to say was, any time that I make a correction on an account I always put an explanation of what that correction is.

Q. By Mr. Carr: Your correction was based on what Mr. Taylor told you, is that right?[98] A. Yes.

Q. Let us make a mark on this sheet showing the division of the first page between the portion which we consider the original and that portion which you consider your corrected part. Will you mark a line across it? Now, at the top that was the original record and the bottom is the corrected part?

A. That is correct, sir.

Mr. Carr: I am going to object to the document on the ground, especially to the first page, your Honor, that that would be a conclusion of this witness and it would not be binding on this defendant at all. It is not shown to be a part of the regular bookkeeping and I object to its introduction in evidence. In fact, I object to the whole

(Testimony of Richard C. Snodgress)

exhibit on the ground it has not been shown to be accurate and the foundation has not been properly laid to place it in evidence in lieu of the original. And on the further ground it is not material to the issues in this case and it might work to the prejudice of this defendant.

The Court: I will allow the typewritten portion at the top of the first page to be covered up by the clerk.

Mr. Carr: How about the figures that were put on as a result of his talk with Mr. Taylor?

The Court: I think the testimony is sufficient.

Mr. Carr: May I make one further objection on the ground that it is a self-serving proposition and that it is not [99] binding on this defendant—the figures at the bottom of that page.

The Court: Well, the objection is overruled. The clerk will cover that portion up that I indicated.

The Clerk: Government's Exhibit 13 in evidence.

(The document referred to and previously marked as Government's Exhibit 13, was received in evidence.)

Mr. Carr: Shall I go on with my cross examination?

Mr. Bell: I have some questions on direct.

Redirect Examination.

Q. By Mr. Bell: Are you familiar, Mr. Snodgress, with the procedure in posting an account such as appears in Government's Exhibit 13? A. Yes, sir.

Q. I recall your attention to the column at the left, "old balance," and the column at the right, "new bal-

(Testimony of Richard C. Snodgrass)

ance.” Is there any procedure by which the figures in one are transferred to the other?

A. Yes, sir. For each posting you pick up that as you place it in your machine, the balance that shows in the new balance column, strike your motor bar on your machine, which puts it in the balance column called “old balance.”

Q. Now, I call your attention to the second page and to those particular entries opposite which there is a pencil mark on the second line in the right-hand column, “new balance.” There is a figure of 591 and there is a pencil [100] mark and the third figure in the old column is a pencil mark 691, and there is a pencil—will you explain how it appears that in the new balance it is 5 and the old balance it is 6? A. That is a bookkeeping error. The bookkeeper should have picked up 591 and picked up 691.

Q. Now, does this same sheet contain any corrections of that error?

A. Yes, sir; here is the correction.

Q. And you are pointing to the fifth and sixth entries in the old balance column? A. That is right.

Q. The fifth one reading 691 and the sixth one reading 691 or 591. Is that right? A. That is right.

Q. Now, did you find any other records of the balance or the account—records of the Italian-American Delicatessen Company in your bank?

A. At this time, you mean?

Q. No, I mean did you—calling your attention to the time when Mr. Taylor called at your bank, I believe in December 1946, did you search your files and records thoroughly? A. I did,

(Testimony of Richard C. Snodgrass)

Q. Did you find any other records other than these or [101] the originals of these which constitute Government's Exhibit 13?

A. Well, I found some checks which I turned over to Mr. Taylor.

Q. I mean balance sheets of this type?

A. No, sir, there were none.

Q. Now, as I say, I would like to have you explain further, a little further and a little more clearly what these figures at the top of the first sheet represent. There is a group of figures there. What do they indicate?

A. These figures?

Q. Yes.

A. Those are the individual amounts of checks which were deducted from the balance of the account.

Q. And that is under the column which you have checks, is that right? A. Yes, sir, that is right.

Q. And you said something about reversing them down below here in the lower half in the two left-hand columns? A. That is right.

Q. Now, what do you mean by "reversing"? What is that process?

A. When the checks are deducted it reduces the balance. When we reverse that we add back the amounts of those checks nullifying the original posting. [102]

Q. Now, on this first page, about the middle of the page, just above the wavy line which I believe you drew here at Mr. Carr's suggestion, there is a line under date and new balance which reads 47, January 15, 143,692,

(Testimony of Richard C. Snodgress)

and I believe there is an O.D. at the right. What does that indicate?

A. That would indicate the account was overdrawn by that amount.

Q. By 143,692 pounds? A. Yes, sir.

Mr. Bell: That is all. You may cross-examine.

Recross-Examination

By Mr. Carr:

Q. Now, Mr. Snodgress, you went to work with the Bank of America at what date?

A. August 16th, 1939.

Q. 1939? A. Yes, sir.

Q. Previous to that time did you work for Mr. Fly?

A. No, sir.

Q. You never worked for him, did you?

A. No, sir.

Q. Did you know Mr. Fly? A. No, sir.

Q. And when did you go to the Santa Monica and Vermont [103] Branch? A. December 16, 1946.

Q. And when did you ever become acquainted—strike that. Did you ever become acquainted with Mr. Fly?

A. No, sir.

Q. Would you know him if you saw him?

A. No, I don't believe so.

Q. Now, you just asserted—I notice on the right-hand column here it says "Date" in print. First it says, "Deposit, Date, New Balance." The first figure is 1,730. Is that a balance or is that an overdraft?

A. That is a balance.

(Testimony of Richard C. Snodgrass)

Q. Now, in the same column it says "47, January 15, 143,692." You told Mr. Bell that was an overdraft. Why would that appear in that column?

A. Well, whether the balance is overdrawn or whether it is a good balance, it still appears in the same column but the distinction is that on an overdraft there is O.D. printed after the figures.

Q. Where is the O.D. on this one?

A. Right there.

Q. Is that supposed to be an O.D. there?

A. Yes, sir.

Q. Who put the O.D. on there?

A. The machine automatically prints it. [104]

Q. If there was an overdraft of 143,000 on that date why did you recompute the figures?

A. Because the checks did not belong in the account.

Q. Oh, you took the checks off of this account?

A. They were delivered to the OPA.

Q. Then there wasn't any overdraft of 143,692, is that right?

A. That is right. If those checks didn't belong there there wouldn't be the overdraft.

Q. So that figure is incorrect, isn't it? A. Yes.

Q. Now, I don't see any dates. I call your attention to these figures at the top of sheet one where, for example, at the top it says, "1,730 old balance—" under old balance, "1,730." That means pounds, I take it?

A. Yes, sir.

(Testimony of Richard C. Snodgress)

Q. Then there is a figure five thousand dash seventeen hundred. I see no date there at all to indicate when that transaction occurred.

A. The date of all the checks that are posted in one posting appears when you total the machine out. All those checks would be posted on this date, December 4, 1946.

Q. Now, as a matter of fact, when a check cleared the bank, a ration check, you kept the check, did you not? You did not send it back to the customer? [105]

A. That is right.

Q. So he never saw his checks again after they once came into the bank?

A. He could pick up a statement.

Q. I understand, but the checks he never saw again?

A. He could ask for a return of his check with the statement.

Q. In the course of the general practice they were not returned, is that right?

A. Not unless they were specifically asked for, no.

Q. The general practice was not to return them, am I correct? A. Yes.

Q. And how often, sir, if you know, would you destroy those checks or how would you get rid of the cancelled checks?

A. They would be kept in the file indefinitely.

Q. Didn't you have a period when they were transferred to the OPA or destroyed or something happen to them?

A. No. At the close of rationing they ordered us to send out statements to all the customers.

(Testimony of Richard C. Snodgrass)

Q. Well, do I understand that you accumulated all of the checks there in the bank and held them for the whole period, rationing period?

A. Statements could be sent out to the customers when—
[106] ever a sheet was ready.

Q. But did you accumulate all of those checks?

A. From the time that I arrived at that branch we accumulated all the checks except the ones—

Q. And that was the practice in vogue at the time you arrived?

A. I will not vouch for what practice was in vogue before I got there.

Q. Well, you knew generally what the practice was respecting rationing, didn't you?

A. No, sir, I didn't.

Q. Well, you have testified—I am not endeavoring in any way to trap you on this. What I am trying to find out is if you really had the knowledge of the system of rationing in the bank, including these?

A. Yes, yes, I did, sir, but I don't know whether they were sending out statements regularly prior to my arrival or whether they just sent them out when they were called for. After my arrival we only gave them out when they were called for.

Q. Now, who put these pencil marks on sheet 2, do you know?

A. No, I don't. I think I drew that arrow.

Q. Do you remember when or on what occasion?

A. No. [107]

(Testimony of Richard C. Snodgress)

Q. It was after you discussed the matter with Mr. Taylor, was it not?

A. Yes, sir, I presume so. I am not sure how they got there.

Q. Now, let me see if I understand you. Mr. Taylor came in to see you—came into the bank. You recall that occasion and about the date?

A. No. I saw Mr. Taylor several times after my arrival there.

Q. Well, do you recall the first time that you sat down with Mr. Taylor and went over these ledger sheets?

A. No, I don't recall the exact date.

Q. Not the exact date?

A. I think it was in December of 1946 or January of 1947.

Q. And who was present at that time?

A. Well, I believe Mr. Eltinge was there.

Q. And at that time isn't it a fact that Mr. Taylor told you that you ought to recompute these figures?

A. I believe he did. I believe he said the checks did not belong in the account.

Q. And you made no recomputation at all until you had the conversation with Mr. Taylor, is that correct?

A. I think that is correct.

Q. So up to the time that Mr. Taylor arrived the bank [108] had treated in the course of ordinary business on page one here, the original copy, it as being down to the line which you drew?

A. Yes, sir; that is right. So far as we were concerned, that was the balance.

Q. And on page 2 I take it this is in the same condition except for the pencil marks. At the time Mr. Taylor

(Testimony of Richard C. Snodgrass)

called everything was on there except the pencil marks, is that right?

A. I don't know about that, sir. I don't know who made that copy.

Q. Now, on the third sheet it says, "As per E.X.P. on re-made sheet." What does that purport to represent?

A. Well, that is one check that was not—that should not have been reversed here. In other words, we reversed all the checks and on this previous sheet then deducted the one which apparently belonged there.

Q. In other words, you decided that that was, in your opinion, a proper correction, is that the idea?

A. (No answer.)

Q. Or not a correct correction. Let me put it that way.

A. Well, the correction was not complete, let us say. 240 needed to be deducted.

Mr. Carr: May I have just one minute, your Honor? I [109] am about to finish.

Q. By Mr. Carr: Did Mr. Taylor have someone else with him at that time, some other agent?

A. At one time Mr. Taylor came out, I am pretty sure, and he had someone else with him. I don't recall exactly.

Q. Approximately how many times would you say that you talked to Mr. Taylor? I know you can't be absolutely accurate but as near as you can remember how many times, from the first occasion, did you talk to Mr. Taylor?

A. Oh, probably about four times, four or five times.

Q. And each time it was in connection with his investigation of the defendant, Mr. Fly?

A. Investigating the ration record, yes.

Q. I note on page 1 that someone has crossed out "American-Italian Delicatessen, 4356 Sunset Boulevard,

(Testimony of Richard C. Snodgress)

Los Angeles, Cal.” Is that a pen mark or pencil? It has been crossed out. A. It looks like—

Q. Who did that? A. I have no idea.

Q. Well, is that an ordinary way of handling a record at the bank? A. Oh, no, sir.

Q. Is there any way you can find out why that was crossed out? [110]

A. No, there is no way I can find out. From the appearance of the line it looks like it was done on the top copy. This is the carbon here.

Q. This supposedly represents the name of the account, is that right—Italian-American Delicatessen, 4356 Sunset Boulevard. Now, someone has run a pen point X-wise, is that right? A. Yes, sir.

Q. And you have no explanation? A. No, sir.

Q. Could it mean in general practice that the account was being changed to some other name?

A. Well, it wouldn't be changed by X-ing out. That would not be standard procedure.

Q. That is not standard procedure to mark that out that way? A. No, sir.

Mr. Carr: That is all.

Redirect Examination

By Mr. Bell:

Q. Mr. Snodgress, Mr. Carr suggested to you some things that Mr. Taylor told you and told you to do. Is it the custom of your bank to do what investigators tell you to do so far as keeping your records is concerned?

A. No, sir. We kept the records as we determined they [111] should be.

Q. Any corrections that are made on there do you simply take Mr. Taylor's word for it or do you check

(Testimony of Richard C. Snodgrass)

your own records to ascertain whether the corrections should be made?

A. No; we would check our own records.

Q. And then any correction that is made would be a correction in line with your other records?

Mr. Carr: Objected to as asking for a conclusion.

The Court: It is a rather leading statement. I will sustain the objection.

Q. By Mr. Bell: I don't understand the answer you have made here to the effect that on page one this figure representing the overdraft of 143,692 is an incorrect correction and should not appear there. What do you mean by that? It does appear there, doesn't it?

A. Yes, sir. I don't know that I expressed it quite the way you say it. If I did—

Q. Will you explain to the jury what you mean by saying that, when you were asked by Mr. Carr?

A. I presume I stated it was an incorrect balance, this overdrawn balance. If that is the case what I meant was that these checks were deducted from the balance of the account thereby creating this balance which was not properly chargeable to the account. Therefore, the balance that [112] resulted was incorrect.

Q. Did you see the checks yourself?

A. I believe I did, sir.

Q. And why do you now say they were not properly charged to the account?

A. Because they did not bear the name of the account on the check.

Q. What did they bear?

A. Most of them said, "Italian-American Import Company." Perhaps all of them did. I don't recall for sure.

(Testimony of Richard C. Snodgress)

Q. It wasn't until after you made that that you have now concluded it should not have been on there, is that right?

A. That is right.

Q. But as far as the mathematical figures are concerned, the number of checks which you saw made out to the Italian-American Import Company, if charged to this account, would bring this figure to 143,692 overdraft?

A. That is right.

Mr. Bell: That is all.

Recross-Examination

By Mr. Carr:

Q. I would like to ask a few more questions in view of that. You say now it was not properly charged but that was after, I believe, you talked to Mr. Taylor? [113]

A. Yes, sir.

Q. Now, you as a matter of practice in the bank, had treated the checks drawn by Mr. Fly as checks on that account even though they were written on the line above his signature "American Import Company."

A. Well, we may have placed them on the account but we wouldn't do that.

Q. The question is, did you do it?

A. We did place them on the account, yes.

Q. And isn't the reason you did that is because you knew and your officials in the bank knew, including the manager, that Mr. Fly was the sole proprietor of the business?

A. I didn't have any such knowledge myself.

Q. Well, do you have the knowledge that your manager knew that?

A. No.

Q. Do you now know that the manager knew that?

A. I don't quite understand your question, I guess.

(Testimony of Richard C. Snodgrass)

Mr. Bell: Objected to anyway as calling for a conclusion of the witness as to what somebody else knew.

Mr. Carr: I don't suppose he would know what another person knows. I will withdraw the question and ask it again. What I am getting at is, at the bank, when a ration check comes in, somebody determines whether or not it goes to a certain account, is that right? [114]

A. Yes, sir.

Q. And that person makes a decision and that check then is charged to that account? A. That is right.

Q. Now, in general practice the bank, whether it be a ration check or a check for money, doesn't charge a check to some account on which it is not written, is that right?

A. That is right, sir.

Q. Now, in this particular case the checks which were signed "James M. Fly," no matter what appeared above his name, were charged to that account, the American Delicatessen account?

A. They were charged to it, yes.

Mr. Carr: That is all.

Mr. Bell: No further questions.

The Court: We will have a short recess at this time. May it be stipulated the usual admonition has been given?

Mr. Carr: So stipulated, your Honor.

Mr. Bell: Yes, your Honor, so stipulated.

(Short recess.)

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel. Proceed.

Mr. Bell: Mr. Carle. [115]

(Testimony of Richard C. Snodgress)

Q. It wasn't until after you made that that you have now concluded it should not have been on there, is that right?

A. That is right.

Q. But as far as the mathematical figures are concerned, the number of checks which you saw made out to the Italian-American Import Company, if charged to this account, would bring this figure to 143,692 overdraft?

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A. Well, we may have placed them on the account but we wouldn't do that.

Q. The question is, did you do it?

A. We did place them on the account, yes.

Q. And isn't the reason you did that is because you knew and your officials in the bank knew, including the manager, that Mr. Fly was the sole proprietor of the business?

A. I didn't have any such knowledge myself.

Q. Well, do you have the knowledge that your manager knew that?

A. No.

Q. Do you now know that the manager knew that?

A. I don't quite understand your question, I guess.

(Testimony of Richard C. Snodgrass)

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A. Yes, sir.

Q. And that person makes a decision and that check then is charged to that account? A. That is right.

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A. They were charged to it, yes.

Mr. Carr: That is all.

Mr. Bell: No further questions.

The Court: We will have a short recess at this time. May it be stipulated the usual admonition has been given?

Mr. Carr: So stipulated, your Honor.

Mr. Bell: Yes, your Honor, so stipulated.

(Short recess.)

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel. Proceed.

Mr. Bell: Mr. Carle. [115]

JACKSON T. CARLE,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Mr. Carr: There was some witness to be recalled and I have forgotten who it is, your Honor.

Mr. Bell: Mr. Carle was to be recalled. Mr. Snodgrass and Mr. Eltinge were on this morning.

Mr. Carr: I was told by his Honor I was going to have an opportunity to ask a question of some witness and I am sure it wasn't of a man by the name of Carle.

Mr. Bell: If you wish to cross-examine further any witness who has heretofore testified I will stipulate that he may be recalled at this time, if you will just name the witness.

The Court: All right, let us proceed.

The Clerk: Your name is Jackson T. Carle?

The Witness: Yes.

Direct Examination (Resumed)

By Mr. Bell:

Q. You were sworn and testified yesterday, weren't you, Mr. Carle? A. Yes, sir.

Q. And you had testified that you were with the OPA and in charge of the registration records? [116]

A. Yes, sir.

Q. It now appears that those records are not available, Mr. Carr, so I shall ask you as to your recollection as to the contents of some of them. Calling your attention to the records of the registration of Mr. James M. Fly, and the American-Italian Delicatessen Company, among those records did you—strike that, please.

(Testimony of Jackson T. Carle)

What do you recall as constituting the records in your file?

A. We had two separate sets of records of our registrants who had bank accounts. One was the registration establishing the allowable inventory or stock of sugar which a wholesaler or retailer might have on hand. That was kept in our wholesale-retail section and then we had records showing the permission to establish a ration bank account along with a duplicate signature card, showing the signature that would be fixed to the ration checks.

Those were kept in our ration banking section.

Q. As to this duplicate signature card, from whom was that obtained?

A. That was obtained from the bank in which the account was kept.

Q. Now, you spoke of allowable bank account. How was that determined?

A. Upon the original registration of a retailer which [117] would be the class of sugar user in which a delicatessen would fall. The applicant filled out a form which was designated in our records as Form 305, in which he showed how much sugar he had sold in his store and how much he had purchased for sale in his store during the month preceding the start of rationing. From that figure we derived the amount that he might have on hand in general by dividing the monthly quantity by four, thus giving him a stock of sugar which he might have on hand equal to a week's supply.

Q. Do you recall the quantity of sugar which was allowed to be kept in the bank account by Mr. Fly or the Italian-American Delicatessen?

A. The registration form for the Italian-American Delicatessen showed on the basis of his declaration of

(Testimony of Jackson T. Carle)

sugar usage he was entitled to a 400-pound inventory of sugar. Subsequently, about a year and a half after his registration an additional quantity of sugar was allowed to consumers for canning purposes and it was necessary to increase the allowable inventory of sugar so the retailer could meet that additional demand from consumers and he was given an additional 20 per cent which would have amounted to 80 pounds as a loan.

Mr. Carr: I move to strike the entire answer as being immaterial to any issue involved in this case.

Mr. Bell: This shows what he was allowed to have. It [118] shows what he was authorized to have and upon this his bank account was based and it goes to show willfulness as to the fact that if a man knows he has only 400 pounds allowable and he is drawing 5,000-pound checks, it has a very definite bearing on his intent and knowledge.

Mr. Carr: The only trouble is it tends to mislead the jury. He is not charged here with an allowable amount. He is charged here with issuing checks on an account that did not exist. That is the sole charge.

Mr. Bell: And Mr. Carr sought to introduce yesterday how much his balance was so I think he himself has indicated the materiality of it.

The Court: I think a portion of it probably should go out. Will you read the question?

(Question read.)

The Court: Motion will be denied.

Q. By Mr. Bell: Now, what happened if a person had a larger balance in the bank than that allowed on his registration certificate?

Mr. Carr: That is objected to as being wholly immaterial. We are getting off, your Honor, into a trial of

(Testimony of Jackson T. Carle)

an issue that is not in this case. The simple issue here is whether or not the man had the account on which these checks were issued, and not what his allowables were.

Mr. Bell: Counsel himself injected the extraneous issue [119] of a different bank account. I have tried to keep it to the Italian-American Import Company, and counsel tried to bring in the delicatessen.

The Court: The objection is overruled.

Mr. Bell: Will you read the question?

(Question read.)

The Witness: That was classed as excess inventory and was recaptured by the Office of Price Administration. In other words, the holder of the excess inventory was required to sell the sugar or to surrender the ration points which he had in the bank, to the OPA, thus bringing him back to his allowable inventory.

Q. By Mr. Bell: I believe if my memory serves me correctly you were asked yesterday if you made a search to find if the Italian-American Import Company had a registration. Were you asked that question?

A. Yes.

Q. And James M. Fly personally. Were you asked that question? A. Yes.

Q. And you searched the records for both of those?

A. I searched the record and discovered only the Italian-American Delicatessen by James M. Fly.

Mr. Bell: You may cross-examine. [120]

(Testimony of Jackson T. Carle)

Cross-Examination

By Mr. Carr:

Q. You found the name James M. Fly on that registration, didn't you?

A. I found the registration for the Italian-American Delicatessen signed by James M. Fly as owner and on the signature card, Italian-American Delicatessen by James M. Fly.

Q. What was the address on it?

A. 4300 block on Sunset Boulevard.

Q. 4356?

A. That sounds approximately correct.

Mr. Carr: That is all.

Mr. Bell: No further questions.

The Court: Call your next witness.

Mr. Bell: Mr. Peterson, please.

FRED PETERSON,

called as a witness by and on behalf of the plaintiff, having been first during sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Fred Peterson.

Direct Examination

By Mr. Bell:

Q. Will you keep your voice up, Mr. Peterson, so all [121] the jurors can hear you? What is your occupation, Mr. Peterson? A. Public accounting.

Q. During the year 1946 what was your occupation?

A. Assistant cashier and chief clerk in the Bank of America.

(Testimony of Fred Peterson)

Q. What branch?

A. Santa Monica and Vermont branch.

Q. Do you know Mr. Eltinge there?

A. Yes, sir.

Q. Do you know Mr. Snodgress? A. Yes, sir.

Q. Do you know a man by the name of Gordon Smith? A. Yes, sir.

Q. Do you know the defendant, Mr. Fly?

A. Yes, sir.

Q. How long have you known Mr. Fly?

A. About seven years.

Q. Did you ever have any dealings with Mr. Fly at the bank there where you were employed?

A. Yes, sir.

Q. Did you ever have any dealings with him in connection with the sugar account? A. Yes, sir.

Q. Calling your attention to the early part of 1946, [122] did you see Mr. Fly? A. Yes, sir.

Q. Did you have any conversations with him in connection with his sugar account at the bank?

A. Yes, sir.

Q. Can you recall where and when the first conversation occurred, approximately?

A. No, I couldn't say exactly where.

Q. Did you have one or more than one conversation with him? A. More than one.

Q. Well, would you say there were a few or a great many? A. A great many.

Q. How frequently did you see Mr. Fly during the period from the first of 1946 up to the end or about October, 1946? A. Practically every day.

Q. And did you have conversations with him on those occasions? A. Yes, sir.

(Testimony of Fred Peterson)

Q. Calling your attention now to the earliest conversation you can recall with Mr. Fly—I believe you stated you cannot recall where the first one occurred?

A. That is right. [123]

Q. Where are the places at which you had conversations with him?

A. Usually—well, at his store or when he would come in the bank.

Q. And by store do you mean his delicatessen store?

A. Yes, sir.

Q. You also talked to him in the bank?

A. Yes, sir.

Q. Do you recall seeing him at any other place?

A. Oh, yes, I was with him several other places.

Q. Well, what other places do you now recall?

A. Well, we would go out to dinner in the evening—things like that.

Q. Does Mr. Fly have more than one place of business? A. Yes, sir.

Q. Did you see him at any of the other places of business? A. Yes, sir.

Q. All right. Now, coming back to the earliest conversation that you can recall in the first part of 1946, can you recall who was present at the conversation?

A. I don't believe anyone would be present.

Q. And you cannot now recall whether the first conversation occurred—can you recall where it did occur?

A. No, sir. [124]

Q. Will you relate that conversation?

Mr. Carr: I would like to have a date fixed.

Q. By Mr. Bell: Can you fix the date any closer?

A. January or February, probably—the early part of 1946.

(Testimony of Fred Peterson)

The Court: All right.

Q. By Mr. Bell: What was the conversation you had with him?

Mr. Carr: Object to that on the ground the conversation took place prior to the offense charged, your Honor.

Mr. Bell: This, your Honor, shows a continuing course of conduct. The conversation we intend to show was where the arrangements were made and they were continuously acted upon throughout the rest of the year.

The Court: I will reserve a motion to strike if it is not connected up.

Q. By Mr. Bell: What was the conversation, Mr. Peterson?

A. In regard to the sugar account which was overdrawn at the time?

Q. Yes, what did he say and what did you say?

A. He asked me if I could credit the account. I told him I could and I did.

Q. What did you do?

A. Well, I credited the account with a phoney deposit. [125]

Q. Do you recall how much it was?

Mr. Carr: I move to strike the word "phoney." "Phoney" is a lingo that I don't understand.

The Court: You had better explain what you mean.

The Witness: Well, it was an invalid deposit.

Q. By Mr. Bell: Do you recall how much the deposit was?

A. No.

Q. When you say it was invalid what do you mean by that?

A. Well, I just—

Mr. Carr: I object to this on the ground it is asking for the witness' conclusion.

(Testimony of Fred Peterson)

Mr. Bell: I am asking him to interpret the meaning of his word. You objected to the word he used.

Mr. Carr: I will ask the word "invalid" be stricken, too.

The Court: He is trying to explain what he means by it. Go ahead.

The Witness: I just made it up. There was actually no credit there.

Q. By Mr. Bell: Did you make up the amount of the credit? A. Yes, sir.

Q. How about the date? Did you make that up? [126] A. Yes, sir.

Q. And anything else on the entry that you made?

A. Well, probably a transit description.

Q. And when you made that what did you put that entry upon—what kind of paper—what was the form?

A. A regular sugar deposit slip.

Q. Merely as an illustration of the form and not pertaining to the figures thereon at all, did it resemble the form of deposit slip here which is Government's Exhibit 7-8? A. Yes.

Q. Did it read as this one does, the ration deposit slip: "The United States of America, Office of Price Administration, Sugar Credits Deposited in" and then the name of the bank? A. Yes, sir.

Q. Did you have any other conversations around that time with Mr. Fly?

Mr. Carr: I am going to object to this line of questioning, your Honor, on the ground it is highly prejudicial. It does not relate to any issue involved in the case. It doesn't go to show intent with respect to the charge in the indictment, to-wit, that there was no bank account on which these checks were issued.

(Testimony of Fred Peterson)

The Court: Objection overruled.

Q. By Mr. Bell: Did you have further conversations [127] with Mr. Fly around that time?

A. Yes, sir.

Q. Can you fix the approximate time of the conversations—that is, by date?

A. I couldn't fix the time by date because I saw him every day.

Q. Can you fix the place that the next conversation you recall occurred? A. No, sir.

Q. Well, on the next conversation that you can recall was anyone else present? A. No, sir.

Q. What was the conversation you had thereafter?

A. It was in regard to the same thing.

Q. What was said? What did you say and what did he say?

A. Well, it was just that he asked me if I would credit his account with these invalid deposits.

Q. What did you say?

A. I agreed to and I did.

Q. And you did so? A. Yes, sir.

Q. Now, on about how many occasions can you recall having done that—gone through that process of entering deposits to his credit? [128]

A. There were several.

Q. Was there any break or secession in that conduct or did it continue rather generally and regularly throughout the rest of the year? A. Yes, it did.

Q. Well, what did—what is your answer?

The Witness: It continued throughout the year.

Q. Did you have any conversation with Mr. Fly concerning ration checks? A. Yes, sir.

(Testimony of Fred Peterson)

Q. When was the first conversation you recall having with Mr. Fly concerning ration checks?

A. I couldn't say as to that either.

Q. Did you have more than one? A. Oh, yes.

Q. Did you have a great many? A. Several.

Q. Well, can you fix the time or the place of the earliest of those conversations? A. No.

Q. Well, were any of them held at his place of business? A. The checks?

Q. The discussion as to the checks. Were any of those held in his place of business? [129]

A. The discussions were, yes, sir.

Q. Were any of them held at the bank?

A. Yes, sir.

Q. What was the earliest discussion that you now recall concerning checks?

A. Well, I couldn't say just when, only I decided that it was easier to destroy the checks than it was to make the invalid deposit.

Q. Did you have any conversation with him along that line? A. Yes. We talked about it.

Q. Now, as nearly as you can recall what did you say and what did he say?

Mr. Carr: I am going to object again, your Honor, the same objection. This is purporting to show, I assume, similar offenses and I object on the ground that they are not similar offenses. That testimony is prejudicial to this defendant and does not involve the charges in the indictment.

Mr. Bell: One of the charges in the indictment is that he willfully and unlawfully and knowingly wrote these checks and that there was no mistake about it.

(Testimony of Fred Peterson)

The Court: Objection is overruled.

Q. By Mr. Bell: As near as you recall now try to think back and recall just what Mr. Fly said to you and what you said to Mr. Fly. [130]

A. In regard to these checks?

Q. Yes. You said that you had told him you were going to destroy the checks? A. Yes.

Q. Rather than make deposits? A. Yes.

Q. Fictitious deposits. Now, what did you say and what did he say?

A. Well, as near as I can remember—

Q. Keep your voice up.

A. As near as I can remember I just told him that I would destroy the checks. He asked me if I would and I told him yes and that was about the size of the conversation.

Q. All right. Did you have more than one conversation on that subject? A. Oh, yes, several.

Q. Well, was anything further said at these other conversations?

A. Oh, it was all about the same thing. It was always about the checks.

Q. I am asking you, Mr. Peterson, to try to remember as nearly as possible, in all fairness to Mr. Fly so that you will quote him as nearly as you can, I am asking you to search your memory now and try to say just what he said and just what you said if you can possibly recall it? [131]

A. Well, that I can't do. He asked me to take care of them and I said that I would.

Q. And did these conversations cease sometime in 1946 or did they continue up until the latter part of 1946?

(Testimony of Fred Peterson)

A. They continued right up until the latter part of 1946.

Q. You are no longer with the bank, are you?

A. No, sir.

Q. When did you leave the bank?

A. September 30th, 1946.

Q. Did you have any conversation with Mr. Fly concerning your leaving the bank? A. Yes, sir.

Q. Where did that conversation occur?

A. I couldn't say the exact place.

Q. Well, was it at his place of business, at the bank, or where? A. Probably at his place of business.

Q. Was anyone else present? A. No, sir.

Q. Now again think back and try to recall as nearly as you can what you said to him and what he said to you.

Mr. Carr: Objected to on the ground it is wholly immaterial.

The Court: I can't tell you from the way the question is asked whether it is material or not. [132]

Mr. Carr: But, your Honor, the answer comes out and then it is like the old saying—you don't like for me to say it, I know, but if you will pardon me, it is like, you know, ringing the bell once. The harm is done.

The Court: Well, I will reserve a motion to strike. You may answer the question.

The Witness: Where were we now?

The Court: He is asking for the conversation at the time you were leaving the bank or when you were about to leave the bank.

The Witness: I told Mr. Fly that I had prepared my resignation and intended to put it in and that he shouldn't

(Testimony of Fred Peterson)

write any more checks. And at a later date he contacted me and told me that he had written more checks and asked me to go back to the bank.

Q. By Mr. Bell: When was this?

A. That was about the middle of October.

Q. Where did you hold the conversation?

A. That particular conversation, I remember, was at Tom Brenneman's Restaurant over dinner.

Q. Was anyone else present? A. No.

Q. Now, relate, if you can, the entire conversation.

A. Well, I told him that I wouldn't go back to work at the bank and he said, "Well, we will have to do something," [133] and it was then that it was suggested—

Q. Who suggested it?

A. Mr. Fly suggested that I see Mr. Smith.

Q. Who was Mr. Smith?

A. He was employed at the bank at that time.

Q. Was that the Mr. Smith who succeeded you?

A. Yes, sir.

Q. All right, go ahead and tell the rest of the conversation. A. I approached Mr. Smith.

Q. Well, going back to the conversation, have you related all of it that you can recall?

A. Well, as I recall it, that was about all there was. I told him I would see Mr. Smith, which I did.

Q. Well, is your memory exhausted as to anything further that was said at that time?

A. Well, he said he would pay Mr. Smith one cent a pound for these checks.

Q. Well, did he say anything further about what you should do? A. No, sir.

(Testimony of Fred Peterson)

Q. Well, do you recall whether or not he asked you to tell Mr. Smith anything?

A. Only that he told me to ask Smith if he would take care of it. [134]

The Court: You cannot tell us what you told Smith. After you talked to Smith did you report back to Mr. Fly?

The Witness: Oh, yes, then I did.

The Court: To Mr. Fly?

The Witness: Yes, sir.

Q. By Mr. Bell: Did you contact Mr. Smith?

A. Yes, sir.

Q. And did you report back to Mr. Fly?

A. Yes, sir.

Q. And where did you see Mr. Fly?

A. I don't recall the exact location.

Q. Well, about when did you see him?

A. Well, it would have been the next day, the day after I talked to Mr. Smith.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Relate the conversation as nearly as you can.

A. I told him—

Mr. Carr: I assume, if I may interrupt, my objection will run to this line of testimony.

The Court: That is all right.

Mr. Carr: On the same ground, your Honor.

The Court: That is right.

Q. By Mr. Bell: Relate what he said to you and what you said to him as nearly as you can remember. [135]

A. I told him I talked to Mr. Smith and Mr. Smith had agreed to destroy these checks as they came in.

(Testimony of Fred Peterson)

Q. Do you recall whether anything further was said about the one cent a pound?

A. No, only that he had said he would pay him one cent a pound. That was understood.

Q. Did you thereafter have any further dealings with Mr. Fly in connection with the sugar ration account at the bank?

A. Yes, sir.

Q. What was the transactions that you had after that?

A. Mr. Fly gave me money to give to Mr. Smith.

Q. When he gave you the money did he say anything to you?

A. Just, "Give this to Mr. Smith." "Smitty" we called him.

Q. About how many occasions did he give you some money to give to Mr. Smith?

A. Several. I would not know.

Q. By "several" can you recall whether it was five or six or seven times?

A. Well, 10 or 15 times, 10 or 12.

Q. On each occasion can you recall how much he gave you to give to Mr. Smith?

A. Always various amounts, \$75.00 or \$100.00 or \$125.00. [136] Small amounts like that.

Q. Mr. Peterson, will you describe to the jury a little more completely the manner in which you handled these accounts and as you described briefly, extract or destroy the checks. Will you describe what happened—how those checks were handled?

A. Well, the checks came into the bank on a transmittal letter, possibly two or three times a month.

Q. When did they arrive at the bank—what time of day?

A. In the early morning by messenger.

(Testimony of Fred Peterson)

Q. In what form were they when they arrived?

A. They were fastened around the transmittal letter with a rubber band.

Q. What time did you get to the bank?

A. Usually around seven o'clock.

Q. Do you know what happened then to these ration bank accounts or checks?

A. Yes, sir.

Q. Describe what happened physically?

A. Well, they were placed in the vault and kept there until the end of the month.

Q. Did you place them there?

A. Yes, sir.

Q. Did anyone else handle these accounts other than [137] you?

A. No, sir.

Q. At the end of the month what happened?

A. At the end of the month they were brought out along with all of the other accumulation of ration evidences that would come over the counter. They would be worked up and charged to the various accounts.

Q. And when you came to check those ration checks did you see any checks made out by the Italian-American Import Company?

A. Yes, sir.

Q. And signed by James M. Fly?

A. Yes, sir.

Q. When you came to those checks what did you do with them?

A. I pulled those out and destroyed them.

Q. Have you been prosecuted for your part in that transaction?

A. Yes, sir.

Q. Have you been sentenced?

A. Yes, sir.

Mr. Bell: That is all.

(Testimony of Fred Peterson)

Cross-Examination

By Mr. Carr:

Q. When was the last time you saw Mr. Fly, Mr. [138] Peterson? A. Day before yesterday.

Q. Where did you go to see Mr. Fly on that occasion? A. I just stopped to talk to him.

Q. How much did you ask him for?

A. I asked him for \$100.00.

Q. Mr. Fly doesn't owe you any money at this time, does he? A. He has promised to pay my fine.

Q. Promised to pay your fine? A. Yes, sir.

Q. When was that?

A. Well, right after my—right after I was sentenced.

Q. Why don't you have money to pay your own fine?

A. No, sir.

Q. Why don't you have? A. (No answer.)

Q. When you left town you had \$6,000 in the bank, didn't you? A. Yes, sir.

Q. Where is the \$6,000?

A. Most of it I repaid to my brother-in-law.

Q. To your brother-in-law? A. Yes, sir. [139]

Q. When did you leave town?

A. About the latter part of November or first of December.

Q. Was that at the time the news came up that something might happen?

A. Yes, sir. Mr. Fly told me that he was being investigated.

Q. And you got out of town? A. Yes, sir.

(Testimony of Fred Peterson)

Q. Where were you picked up by the marshal?

A. At Las Vegas.

Q. And you were brought to Los Angeles?

A. Yes, sir.

Q. And were you put in jail?

A. Not here in Los Angeles.

Q. How did you get out? On bail?

A. Yes, sir.

Q. Who made your bail? A. Mr. Fly.

Q. He paid for your bail, did he? A. Yes, sir.

Q. Did you ask him to pay for your bail?

A. Yes, sir.

Q. You and Mr. Fly had been friends for some time?

A. Yes, sir. [140]

Q. And how many times have you talked with Mr. Taylor here after you got back to Los Angeles?

A. I didn't talk to Mr. Taylor after I got back to Los Angeles.

Q. What agents did you talk to?

A. I didn't talk to any agent.

Q. You talked to Mr. Bell?

A. I talked to Mr. Bell just before I came up here the other day.

Q. Well, you entered a plea, didn't you, in some other court? A. Yes, Judge Mathes.

Q. And I believe you got a fine? A. Yes, sir.

Q. You, of course, were not promised anything by anyone, were you? A. No, sir.

Q. Was there any implication you would not be called as a witness?

(Testimony of Fred Peterson)

A. No, sir; my attorney told me he didn't think that I would be called as a witness but that was the only assurance.

Q. You were not in jail; you are out and free, aren't you?
A. Yes, sir.

Q. And all you have now is a fine to pay? [141]

A. Yes, sir.

Q. Incidentally, how many people were you tearing checks up for?
A. Mr. Fly is the only one.

Q. Was that the only one?

A. Yes, sir; I covered an overdraft for one other party.

Q. And, of course, you got nothing out of these things yourself?
A. Well, I wouldn't say that.

Q. What?
A. No, I got something out of it.

Q. When did you decide to leave town, by the way?

A. Shortly—just right before I left.

Q. It was a rather sudden decision, I take it, isn't that right?
A. Yes, sir.

Q. And where were you at the time—I believe you said they found you in Arizona?

A. Yes, in Nevada.

Q. Now, isn't it a fact that you called Mr. Fly several times and asked him for money recently?

A. Yes, sir.

Mr. Carr: That is all. [142]

Redirect Examination

By Mr. Bell:

Q. When you left town did Mr. Fly say anything about your leaving town?
A. Yes, sir.

Q. What did he say?

A. Well, he advised me to leave town.

(Testimony of Fred Peterson)

Mr. Carr: I move to strike that answer. I object to the word "advise".

The Court: I will strike out the word "advised".

Q. By Mr. Bell: Where and when did the conversation occur? A. It was on the telephone.

Q. You have talked to him on the phone before?

A. Yes, sir.

Q. And you are able to recognize his voice?

A. Yes, sir.

Q. What was the conversation?

A. Well, he told me that he was being investigated and he thought it would be a good idea if I would leave town. I was planning to leave anyway to go back to Nebraska.

Q. But that was his statement as nearly as you can recall it? A. Yes, sir.

Mr. Bell: That is all. [143]

Recross-Examination

By Mr. Carr:

Q. How long had you worked in the bank, by the way?

A. Seven years in the Bank of America.

Q. What was your occupation previous to that time?

A. Ten years with the Federal Reserve Bank.

Q. And how old are you, sir? A. 33.

Mr. Carr: That is all.

The Court: Step down. Have you any more witnesses, Mr. Bell?

Mr. Bell: No, your Honor, the Government will rest at this time.

The Court: Ladies and gentlemen of the jury, the court admonishes you not to converse among yourselves or with

anyone else on any subject connected with the trial, or form or express an opinion on it until the cause is finally submitted to you.

Mr. Carr: May I address the court before you let the jury go? I would like to address the court for a short while this afternoon.

The Court: That is what I am going to do now. The jury will retire and then you may address the court.

Mr. Carr: But it is going to take some little time.

The Court: That doesn't matter, we will take the time. [144]

(Whereupon, the jury retired from the courtroom.)

(The following proceedings were had without the presence and hearing of the jury:)

Mr. Carr: Your Honor, I would like a little more time than you have allowed. I would suggest that you recess until about 2:30 or a quarter of three. There is some argument I would like to make.

The Court: Let us have the argument now and then come back at two o'clock.

Mr. Carr: The only thing is, I promised to be in my office at 12:30. I am caught in one of those predicaments where human affairs are involved. Some dear friends of mine have all turned-coat on me and I have a fight out in Beverly Hills on the Home Owners Protective Association and it is pretty hot and rugged.

The Court: Very well, we will let you argue until 10 minutes before 12:30 and then you can finish later.

Mr. Carr: The case is practically over because, very frankly, if your Honor denies my motion my case will last only about 10 minutes.

The Court: Let us see what your motions are. Frankly I have read the case and I do not get the point.

Mr. Carr: That is just one of the indirect points, your Honor.

At this time I wish to move on behalf of the [145] defendant Fly, for a judgment of acquittal on each and every count of the indictment under Rule 29.

Now, my main contention is going to be toward the felony counts, the first seven counts, and the second portion will be that there has been a variance, but the most important consideration as I see it is the matter of whether or not an offense has been charged under the first seven counts.

The indictment charges practically in the terms of the statute. I will take the first count as an example:

“On or about November 11, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and willfully made and use and caused to be made and used a false bill, account, claim and certificate, to-wit: A sugar ration check.”

Now, it is my contention and I argued that matter rather briefly before Judge Mathes, and with all due respect for his judgment I think he gave it rather hurried consideration. I believe it was an error to overrule the motion to dismiss.

Now, in the first place, it has got to be a “false bill, account, claim or certificate.”—one of those four.

Now, in the first place, your Honor, it can't be an account, it certainly can't be a claim and certainly it [146] isn't a certificate. The question is whether or not, according to the Government's insistence, it is a false bill.

Now, without going into great detail I have checked all the dictionaries and I find the word "bill" to mean bill of complaint, bill of injunction, bill of exchange—many things.

The Government seems to contend by its memorandum that "bill" means bill of exchange. Now, I went to the trouble to go back to the Act at its inception and traced the legislative history from the very beginning and I have it here, a portion of which I will call to your Honor's attention, which to my mind clearly shows the word "false bill" was never intended to mean a bill of exchange.

Had it been intended to mean a bill of exchange we must remember one very definite thing and I would like to preface my entrance into that subject with just a short mention of what a bill of exchange is.

Now, mind you, it does not say "a bill of exchange". Let us take the Government's position for a moment and say that "bill" does mean a bill of exchange.

Could ration checks be bills of exchange? In the first place, it is so fundamental it hardly needs mentioning that a bill of exchange is for a sum of money—not a sum of ration points.

Now, I don't think, your Honor, there could be any [147] question about that.

I have gone back to the negotiable instrument law and I find nothing in there to indicate that a bill of exchange can be other than for a sum of money. It is by Code in California that a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at fixed or determinable future a certain sum of money.

Now, if you go back to all of the old cases, and I have some here but shall not take your Honor's time by reading them—I know your Honor is schooled in these things and it would be a waste of time, but all the old cases clearly hold that a bill of exchange is neither an export or import nor an exchange of commodities. It is a document for a fixed sum of money.

Now, it is my contention in this case that this check which was issued on a ration account at a bank is certainly not a false bill. It can't possibly be.

Now, in connection with the legislative history of the statute—it is very lengthy and I am going to try to eliminate a great deal of it.

The Court: I will grant that when rationing was in effect they probably did not contemplate it, but that isn't the point. The point is whether the language is broad [148] enough to cover situations which they did not contemplate.

Mr. Carr: I will make that concession.

The Court: Otherwise, every time a new suit arises you would have to—

Mr. Carr: I quite agree with your Honor.

The Court: Amend the bill. This question has risen repeatedly and the courts have had no difficulty in tying them in.

Mr. Carr: I understand that.

The Court: In tying them in to rationing. I long ago held that ration coupons were a writing of the type involved and our Circuit Court of Appeals had no difficulty in so holding. You are familiar with the case. That had to do with a prescription being filled by a druggist and it was held that the prescription was an instrumentality through which something was obtained.

Mr. Carr: I do not quarrel with that. I think that is absolutely sound, but here you have an entirely different situation. You have a statute which was a claim statute but which now has been enlarged to cover not only claims against the Government but false statements in connection with claims or false statements to an agency.

Now, when you are using the term "false bill" you are legislating and likewise if you include a ration check because a check is not a bill—it is not a bill of [149] exchange and it never has been and it never will be until the law is completely changed.

The Court: Let me call your attention to a case which Mr. Bell did not recite in his memorandum, but which I have had occasion to study. It is a case from the Second Circuit—United States against Goldsmith.

In that case the man was charged with falsifying in an affidavit which he filed with the consular officer for the purpose of securing the issuance of a quota immigration to an alien.

Mr. Carr: I am familiar with that case, your Honor.

The Court: In that case the court held that an affidavit of that type was a means of obtaining a privilege from the United States. They did not try to designate whether it was a false bill or account or claim or certificate.

Mr. Carr: That comes under the second portion of the statute. It comes under the portion which says that if a false statement made to an agency was within the jurisdiction of the United States—there are two sections to this Act.

Mr. Bell: That is the portion this action is brought under.

Mr. Carr: I don't agree with you, counsel. You have got two breakdowns of that section. You have such a thing as a false claim.

The Court: "or whoever shall knowingly and willfully [150] falsify or conceal or cover up by any trick, scheme, or device a material fact—"

Mr. Carr: "or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States or America is a stockholder—"

and so forth.

Mr. Carr: Your Honor, may I interrupt for a moment at this point? There you have a false claim or you have a false statement made to an agency of the Government, or you have an offense by using a false bill, a voucher, or receipt and so forth. You have separate offenses. This charge is laid under the latter one which has to do with the presentation of a false bill, account, claim or certificate containing something fictitious, and my contention is, your Honor, that it is not a false bill. It cannot be a false bill.

The statute by no stretch of the imagination was ever intended nor does it on its face cover a ration check. [151] If I sent a bill in and it had erroneous statements or entries that would be an offense.

The Court: Why couldn't you have a bill which instead of calling for money calls for things in kind?

Mr. Carr: The question is, what does the statute mean—what does “false bill” mean?

The Court: I agree with you that at the time this statute was enacted nobody thought of rationing. The question is if the statute is broad enough to cover it.

Mr. Carr: Wouldn't even cover a check in my opinion; it wouldn't cover a bill of exchange to my mind. I don't think the words “false bill” would cover a plain check for money because the legislative history shows it was always contemplated to mean a bill or a voucher or something which you are presenting with a false entry in it. In other words, a bill of account or a certificate or registration or something to influence the agency to act. But here you have nothing but a straight check, a check which could be a money check or a ration check. It is not a false bill.

The Court: It is a claim against an account.

Mr. Carr: I can't conceive, your Honor, of a situation where I would draw a check on the Government. The statute never contemplated a draft on the Government.

The Court: The main point is this— the presentation of any kind of paper the object of which is to get something [152] which you would not otherwise get and that paper would be a claim.

Mr. Carr: But a check for ration points is not a claim.

The Court: Certainly it is a claim. You are drawing against a pool which you have there.

Mr. Carr: Your Honor, that seems to me, with all due respect to your Honor's judgment, to be stretching the statute a long ways. Here is a statute on the books

which was never contemplated by its legislative history, or by any of its amendments, to contemplate the mere drawing of a bill of exchange. You are construing here that a check is a claim and I can find no cases in the books where a check has ever been called a claim.

The Court: Look at the case of Johnson against Warden, 134 Fed. (2d) page 166. That is a case from the Ninth Circuit:

“Whoever shall utter or publish as true, any false, forged, altered or counterfeited bond—”

and this is the prescription case.

Mr. Carr: That is a writing.

The Court: It says:

“any false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing—” [153]

Now, you say that they did not intend to cover private writings at all?

Mr. Carr: I think the statute shows on its face it covers private writings. That is the difference between that and my situation here.

The Court: But in this decision they had no difficulty in holding this was a writing although a private writing.

Mr. Carr: I am in accord with your judgment on that, but in this case I say the words “false bill”, “account, claim and certificate” do not cover an ordinary money check and it certainly could not cover a ration check because it is not a bill and it is not a claim. A claim—

The Court: A claim is a demand and a check against an account is a demand upon that account. You are not asserting a claim against the person; you are making a demand upon the account and therefore any demand would be a claim. It doesn't have to be just a claim of money.

You see, this statute is one of our oldest statutes.

Mr. Carr: I know it is. I traced it from its very inception.

The Court: It goes way back. It arose during the graft following the Civil War.

Mr. Carr: 1863, I think, —

The Court: Yes, 1863 during the Civil War and the Reconstruction Period. [154]

Mr. Carr: And I have come down to date. You remember the officials from the Department of Interior and Mr. Harold Ickes wrote a letter in which he said he could not enforce the old petroleum industry code and NRA because they were having trouble in getting these people who were making false statements in different kinds of documents and that is what brought about the amendment. But a bill of exchange or check has never been contemplated at any time and I think your Honor is stretching the statute almost beyond its elasticity when you construe a claim, a check on a ration account to be a claim.

The Court: In the case of Fulmer against the United States, there was involved the gold reserve. They had no difficulty in determining where in order to obtain a gold reserve you had to make a certain claim or affidavit and the regulations prescribed an affidavit, but they had no difficulty in reading that into it.

Mr. Carr: That I concede.

The Court: And here is a stronger case. It is not from our circuit but they held that a man who falsified his own records as to narcotic prescriptions—

Mr. Carr: That was the Cotton case involving loans to cotton people. He kept false records. It was an OPA case. I agree with that, that it was held if you keep false records it was within the meaning of the statute. But here [155] you are dealing with just a plain ration check which is not a claim, not a false bill. It is not a certificate in my opinion.

The Court: All right, here is another case from the second Circuit where a man had counterfeited gasoline coupons and the court had no difficulty in holding that gasoline coupons came within that section.

Mr. Carr: And I can go along with that, your Honor, but I cannot bring myself to believe, your Honor, that this statute contemplated a ration check when it said false bill, account, claim or certificate.

The Government has never contended for that. Your Honor is more or less saving them at this late moment.

The Court: I am not saving them. You know what I used to tell my students in law school? I used to tell them the judge is supposed to know more than the lawyers. After all, if I commit error Mr. Bell is not reversed—I am reversed. It is no argument that he is not urging the point. I am supposed to see the point whether he urges it or not.

Mr. Carr: But to persuade your Honor I am pointing out that with all the ingenuity of the United States Attorney's thinking he never came up with the proposition that a claim was a ration check. He always stood on the proposition it was a false bill.

The Court: But it is so alleged. Suppose you present [156] a false demand to a grain elevator for 1,000 bushels of wheat to which you were not entitled? That would be a demand against the elevator people. Let us talk about whiskey. Whiskey is kept in bonded warehouses. You are supposed to withdraw whiskey only by presenting a warehouse receipt. Suppose you present a fictitious or fraudulent warehouse receipt—

Mr. Carr: Then that is a false certificate.

The Court: It isn't a false certificate; it is a false demand.

Mr. Carr: It is a certificate because those are certificates.

The Court: They are individual certificates and not public writings.

Mr. Carr: That is not involved.

The Court: I would not limit that any more than I would limit 72.

Mr. Carr: A certificate under this section—

The Court: Let us get down to claims. Let us have one of the checks that he drew against the account. I will make it up to you. I will let you go until 2:30.

“Transfer to the sugar ration bank account of Stuart & Final 10,000 pounds of sugar. Italian-American Import Company. James M. Fly.”

What is this? [157]

Mr. Carr: A ration check.

The Court: It is a demand addressed to the bank to transfer from this man's account 10,000 pounds of sugar. That is a paper which will entitle this man to go out and purchase 10,000 pounds of sugar. It is just

as much a claim as if it were a claim for money. In other words,

“Transfer to Charlie Carr \$5,000.00”

and addressed to the Bank of America. Of course, if you signed it it would be good; if I signed it it wouldn't be any good.

Mr. Carr: What you are doing, your Honor, is taking a plain ordinary check, which is nothing more than a document drawn on an account, and you are turning it into a demand—not a demand, but a claim against the Government or an agency of the Government. That is what it has to be. It has to contain a false entry. Now, for example, where is the false entry in that?

The Court: The false entry in this, if the jury believes there was no such account, then the false entry is a false demand upon a non-existence account which was handled as this young man testified.

Mr. Carr: Will your Honor bear with me for just a moment? Here we have Ration Order No. 3. I just tried one of these cases not long ago. It covers ration banking, overdrafts, underdrafts, alterations—everything under the sun. [158]

Now, we are stretching a felony statute to where a plain ordinary ration check has now come under a statute passed after the Civil War or during the Civil War. We are stretching it now to mean—that a ration check means either a claim or a false bill. It seems to me, it may not be persuasive, but it has some persuasion that the trouble that was gone to to provide all of these sections in Ration Order No. 3 with respect to ration banking—I would like just to refer to one little phase here.

They covered everything but inheritance taxes in this ration Order No. 3.

The Court: This would not be the first time they have done it. I think you were the United States Attorney when the case of United States against Anderson was tried. The man was accused of stealing aluminum alloy and the statute said, "Property which was being made or manufactured for the Government of the United States," and I wrote the first opinion interpreting that section and I held that the man who stole that aluminum alloy was stealing something which was being kept there to be turned into parts of airplanes for the Government of the United States, and the statute therefore covered it.

Mr. Carr: I understand, but what I am getting at here, we are taking a felony statute which if it does cover the situation certainly takes a lot of legal reasoning and here we have got a whole page of sections which cover everything [159] from lost checks to how deposits are made, how errors must be corrected; the issuance of checks, altered, mutilated checks; overdrafts and everything else. Under that they come into court with 12 counts, stretching seven of them into felony counts, and how we can deal in the idle sophistry of calling them claims is more than I can understand.

The Court: But my friends on the Circuit bench may.

Mr. Carr: They might not be as resourceful as you are.

The Court: They might see it and I have to anticipate what they might see.

Mr. Carr: Of course, if your Honor feels strongly about it and has reached that conclusion there is nothing I can do, but with all due respect I wish during the

lunch hour your Honor would give a little thought to that.

The Court: That is what I have been doing since day before yesterday.

Mr. Carr: I am asking for a little more grace. You might think a little more about it during the lunch hour because I am sincere in saying this—I feel very strongly that these felony statutes do not cover the situation. I will leave it at that but I would like one other point to be made, and that is respecting variance.

They have charged here that there was no sugar ration account in the name of James M. Fly or the Italian- [160] American Import Company. The evidence shows there was an account in the name of James M. Fly. He was the sole proprietor and that account was used by him, and I would like to base that as an additional ground and that on all of the counts in the indictment that a judgment of acquittal should be ordered by your Honor. It seems to be cutting the line pretty fine when he is the sole proprietor and has an account at the bank, and the testimony shows they recognized him as the sole proprietor. They charged his checks against that account whether it was the Italian-American Import Company or the Italian-American Delicatessen. They knew he was the sole proprietor and so treated him and all the evidence shows that.

The Court: That is a matter to argue to the jury.

Mr. Carr: Once more I want to seriously contend that the seven felony counts have been stretched beyond all elasticity to try to cover a ration check under some word such as "false bill, account, claim or certificate", and I respectfully submit there ought to be a judgment of acquittal on the felony counts.

The Court: All right, Mr. Bell.

Mr. Bell: I don't believe there is any necessity of my going any further here because your Honor pointed out nearly everything that needs to be said on the matter.

I think the principal thing to bear in mind is that [161] the statute was intended to be broadly construed. There are cases so holding. Naturally every time a new application of the statute is involved there will be strenuous objection to the effect that the statute was never intended to cover that particular kind of bill or document or statement, and each time undoubtedly it was seriously urged that while the statute of course covered these other things which the various Circuit Courts have held to be within the statute, in this case we are going beyond and we are stretching the statute and therefore we shouldn't stretch it this far.

I know your Honor has looked at the case which I have indicated and further you have looked at some I haven't even included. Insofar as the Goldsmith case is concerned, which your Honor started to quote, Mr. Carr says, "but that case was based upon the latter part of the statute", but so is this one. Both the Goldsmith case and this case are based upon the same statute.

Without further detail I submit that the statute is broad and even though the words "sugar ration checks" are not used, it is just as your Honor pointed out in a recent speech on the Constitution. The exact language has not changed but the situation that it is required to fit has changed and so it is with the statute. We cannot possibly describe in exact terms every bill, every kind of paper, every document which will be covered by the statute. As pointed out by one of the cases [162] at the time when the statute was enacted, there were de-

cisions on the books in which the word "bill" was simply used to indicate bill of exchange. They did not go through and say "bill of exchange" each time. There is that old Supreme Court case which is cited in the trial memorandum and by reading that throughout I imagine literally dozens of times in that rather lengthy decision, all the court says is "bill, bill, bill", except one place where it says "Bill of exchange".

Consequently, it is clear that even if we interpret it as a bill or bill of exchange it would be covered by the statute.

Furthermore, Mr. Carr feels that the term "bill" should be limited to such things as bill of account—a bill in the sense of billing somebody for goods. But if that were true that would make unnecessary and superfluous the words which follow it—the word "account".

The Court: That is the false baggage claim. All the defendant did in that case was to make a false baggage declaration, stating he only had \$850.00 when as a matter of fact he had \$19,500.00. The court said that was a document of the type covered by that section.

Mr. Bell: All the cases indicate a similarly broad interpretation should be given for the purpose of giving effect to the statute. [163]

Mr. Carr: May I add one thought, your Honor?

The Court: Yes.

Mr. Carr: If you hold as you now hold you will in my opinion make every check cashed in every bank in America a Federal offense if there is not sufficient funds in the bank. If it is under the deposit insurance corporation it will come under the jurisdiction of a Federal agency, and if it is in the Federal Reserve System it is still a Federal agency. Each time a check is drawn on a bank in the Federal Reserve System it certainly would

be a matter within the jurisdiction of the United States. Now, your Honor, I am sure that the statute was never contemplated for that nor does it on its surface or face cover a situation of that kind.

Mr. Bell: I do not believe that would follow. Sugar rationing was something entirely and exclusively a Federal function. The Federal Government delegated to the banks one part of that function, namely, the handling of the ration bank accounts, and even the deposit slips, one of which is in evidence here, bears on its face the statement: "United States of America, Sugar Ration Account", so the fear expressed by Mr. Carr I think is groundless.

The Court: Here is another District Court case under the same section, where a man was required to take an affidavit that he wasn't a Communist. The man gave a false statement. He submitted a false statement that he was not [164] a Communist. The court had no difficulty in holding that he could be prosecuted under this section.

Mr. Carr: But we have a different situation in this case in my opinion. That case comes under the provisions of the Act with reference to mis-statement of a material fact to any agency within the Government's jurisdiction.

The Court: The Marcus-Hess case was under the informer statute but the court had no difficulty in that case in holding that the money of the United States had been co-mingled with the state agencies and that the fraud by ribbing up the bidding was perpetrated against the agency and that it ultimately affected the Government so as to bring it within the informer statute.

Mr. Carr: That is right and I do not depart from any of those cases. My simple proposition is you are

taking something that does not come within the purview of the statute and making it so by changing the interpretation of the words either "bill" or "claim".

The Court: I have used several illustrations to indicate how the courts in interpreting Section 72, have had no difficulty in applying it to new instrumentalities, to new writings, private writings ranging from doctors' prescriptions to a druggist's record that he keeps of his prescriptions; to ration coupons, to claims for baggage—to anything that is a document, the object of which is to secure some advantage that you could not otherwise secure. [165]

I am of the view that the point is not well taken and the motion to acquit will be denied. We will recess until two o'clock.

(Whereupon, a recess was had until 2:00 o'clock p. m. of the same day.) [166]

Los Angeles, California, Wednesday, Sept. 24, 1947
2:00 P. M.

The Court: Call the case, Mr. Clerk.

The Clerk: United States of America versus James M. Fly, No. 19,342.

Mr. Carr: The defendant is ready.

Mr. Bell: The Government is ready.

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel.

Mr. Carr: So stipulated.

Mr. Bell: So stipulated.

The Court: You may proceed, gentlemen.

Mr. Carr: Mr. Fly, will you take the stand?

JAMES M. FLY,

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: James M. Fly.

Direct Examination

By Mr. Carr:

Q. Mr. Fly, I believe his Honor mentioned yesterday that the word "Mosca" in the Italian language means fly, is that right? A. That is right.

Q. So Fly is the name you have adopted as the American- [166-A] ized name?

A. It was done long before I was born. My father did it before me.

Q. I will show you Defendant's Exhibit A-1—first I will show you A-2. Where did you first see that?

A. In my—on my desk at 4356 Sunset Boulevard.

Q. State whether or not you opened it?

A. Yes, sir.

Q. And what did you find in it? I show you now Exhibit A-1.

A. That is the letter that I found in it, yes, sir.

Mr. Carr: I will offer this in evidence as Defendant's Exhibit A-1 and A-2.

The Court: They may be received.

(The documents referred to were thereupon marked as Defendant's Exhibits A-1 and A-2, and were received in evidence.)

Mr. Carr: That is all. You may cross examine.

Mr. Bell: I have no cross examination.

The Court: All right, step down.

Is there any further testimony?

Mr. Carr: We rest, your Honor.

The Court: Gentlemen, rather than excuse the jury, if you will approach the bench I will indicate to you what my action is going to be with reference to the instructions.

(The following proceedings were had at the bench and [166-b] without the hearing of the jury:)

The Court: Bring the defendant up here. Somebody has raised that question.

Mr. Carr: I am not going to raise that question, your Honor.

The Court: Very well.

Mr. Carr: That is only done by people who do not know better.

The Court: You have not presented any instructions.

Mr. Carr: No; the case finished so quickly I did not have time to prepare any instructions.

The Court: Very well. I am going to give this one, the first one. It is just a summary.

Mr. Carr: No. 1 we will call it.

The Court: Then the next one—this covers two pages. It is merely definitions. That is No. 2.

Then I will give No. 3, the powers of the President with some modifications. I am not going to give No. 3.

Mr. Carr: The next is No. 4.

The Court: I am giving 4, definition of powers. I am not going to give the next one, No. 5. I am not going to give No. 6. I am going to give my own.

Mr. Carr: How about No. 7?

The Court: Yes, I am giving that one. I am giving No. 8 also. [166-c]

Mr. Carr: May I have a minute to object to some of these?

The Court: You will have an opportunity to object after I have given them to the jury under the new rules.

Mr. Carr: I have got to object beforehand.

The Court: No, no, that is not the rule.

Mr. Carr: I thought the practice was that when the instructions are decided upon then counsel makes his objection.

The Court: No. I may change the wording in the instructions. In addition to that I give a number of my own instructions. That is the way it has been done ever since the new rules went into effect. The only reason I am giving this long one is because of the Corson case. They say I have to give it all.

Instruction No. 9: I do not think 2.8 is necessary. I think I will strike that out.

Mr. Carr: You are not going to give 2.8, are you?

The Court: I will strike that one out. I think it would be confusing.

Mr. Carr: Now, No. 10: I think the court should specify or instruct the jury whether it is a false bill, account, claim or certificate and not leave it to the jury to speculate on a matter of law as to what it is. In other words, if your theory of a claim is right they should [166-d] be instructed that the question is whether or not it is a claim. I don't think the jury should be allowed to speculate as to what it is.

It should be circumscribed as to what it is.

They should determine whether it is a false bill or claim or whatever it is.

The Court: I will put a question mark on that one.

Mr. Carr: Instruction No. 11. I will probably object to that on the ground the term "false sugar ration check" misleads the jury. Are you going to give No. 11? That isn't the charge—false sugar ration check. That is terminology not known to the law as far as I know.

The Court: Well, I will put a question mark on that one. The next is No. 12.

Mr. Carr: Of course I object to it on the ground it is not even consistent. I object to that one.

The Court: All right. I think that is just a summary.

Mr. Carr: Instruction No. 13.

The Court: I am going to give 13 down to here and then I am giving the definition of aiding and abetting of my own. The rest of them I shall not give. The rest of them I shall not give unless you want me to give one on an accomplice.

Mr. Carr: I wish you would give that accomplice instruction.

The Court: I give my own instruction on reasonable [166-e] doubt and my own instructions on intent and presumption of innocence.

All right, gentlemen. Let the record show counsel has been informed by the court of the instructions to be given to the jury.

You may proceed with your argument, Mr. Bell.

(An opening argument was made by Mr. Bell, followed by argument by Mr. Carr, that being followed by closing argument of Mr. Bell.)

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., a recess was had until 10:00 o'clock a. m., Thursday, September 25th, 1947.) [166-f]

Los Angeles, California, Thursday, Sept. 25, 1947,
10:00 A. M.

The Court: Call the calendar, Mr. Clerk.

The Clerk: United States of America versus James M. Fly, No. 19,342.

Mr. Carr: The defendant is ready.

Mr. Bell: The Government is ready.

Mr. Carr: Your Honor, before you bring the jury in, I am somewhat confused and am not in position to object to some of these instructions.

The Court: There is no confusion at all, Mr. Carr. As I explained to you the other day, I was the first man to work under these new rules and I think I understand them. As to what I am going to do, I will do just as we did before the new rules went into effect. I have already informed you what I am going to do about the Government's instructions.

You did not present any and so I will instruct the jury and then the last question I will ask as soon as I have told them about the verdict, will be: Are there any objections to the instructions? And if you say yes, then I will excuse the jury and you will make your objections in open court.

Mr. Carr: No, I think your Honor misunderstood me. They were not numbered yesterday and when you

informed me—I am confused as to which ones you are going to give of the Government's. [167]

The Court: I have changed my mind about some of them.

Mr. Carr: I am not trying to be contentious. I am completely confused.

The Court: I was confused also. In the future I will insist that the instructions be numbered so I can intelligently act upon them.

Unfortunately I have to give this very long four-page instruction. I wish it was not necessary. It has to do with the ration bank system but I presume, under the Corson case we will have to.

Mr. Carr: That is the point I was going to make, your Honor. If I may take just a moment. For example, on page 9 you have sections of other offenses there and on page 9 you have, down at 15.8 (d) (b). They set up other offenses such as unlawful use and possession and overdrafts prohibited and several other crimes. There is nothing in this case about post-dated checks, nothing about overdrafts. There is nothing about those sections on page 9.

The Court: Mr. Bell, why can't we stop with 15.8 (d) and (b) and eliminate—

Mr. Bell: I feel in light of the Corson case it would be hazardous not to give these instructions. This is a description of the procedure set forth by law for the handling of checks. There has been considerable confusion injected into the case as to whether or not the man should have been [168] indicted for overdraft or whether this particular law applies or just what; when he is acting legally and when he isn't and I assume that

so far as the law itself is concerned the jury is a little uncertain and is waiting to hear your Honor express what is the law. It is simply what the law is and the procedure set forth in the regulations.

Mr. Carr: I think it is error, your Honor, to give an instruction covering overdrafts when there is no overdraft charged. The jury might well be confused in construing this as an overdraft and convicting him on that theory.

The Court: You know what the court said in the Corson case. Of course I criticize that decision. I think it was bad law. It is bad law because the man's defense in that case was not that he had possessed the coupons legally but that he simply did not have them. They were planted in his pocket but nevertheless they said I should have read the entire order.

Mr. Carr: That may be true. I am in accord with you but in this case it is all right—I am not objecting to reading the regulations, but when you read the offenses, other offenses that are not charged, and I am specifically referring to page 9 where it says:

“Post-dated checks prohibited: No person may issue or transfer a check before the date it bears.”

Mr. Bell: I would be willing to have that stricken out, [169] those two lines.

Mr. Carr: And

“overdraft prohibited: No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.”

Mr. Bell: I think the jury is entitled to be instructed on that. Mr. Carr himself has more or less implied to the jury that is perfectly legal.

The Court: But 22 should be given.

Mr. Carr: 22 is a different proposition, but I object to the instruction on overdrafts. The jury could very well convict by being misled, your Honor, into believing this was an overdraft.

The Court: I think I will strike out that part of it. As a matter of fact, I wish I did not have to give it at all, but I presume I will have to.

Mr. Bell: I agree with your Honor. I think reading a long instruction is confusing but the Corson case implies it is necessary.

Mr. Carr: May I make one more suggestion?

The Court: Yes.

Mr. Carr: I am speaking now of the instruction that starts out:

“Although the first seven counts of the indictment—” [170] and then it says:

“The term false sugar ration check—”

The Court: I have changed the wording of that. I am going to instruct it is a bill or claim. I am going to eliminate the other two. I will give a straight instruction that under the law a check of the type involved here is a bill or claim which will make the issue here absolutely clear and you will have a question of law in case your client is convicted on any of the first seven counts.

The Court: If there is nothing more, Mr. Bailiff, will you bring in the jury?

(Whereupon, the jury returned to open court.)

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel.

Ladies and gentlemen of the jury, the court will now give you the instructions on the law to govern you in your determination of this case. All the instructions are written and will be read to you as written subject to such modification as I may make while reading them. The only oral instructions will be those at the end governing your conduct in the jury room.

You have already been informed if during your deliberations you desire to have the exhibits they will be sent to you. You are also entitled to have a copy of the indictment if you so desire, especially in a case like this [171] where you have to pass on 12 counts.

You are also entitled to have the instructions should you so desire. In case any question arises as to the meaning of an instruction you can have the entire set sent in to you by making your request known to the bailiff at the door.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the judge of this

court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court,—a wrong for which the parties would have no remedy because it is conclusively presumed by the court and all [172] higher tribunals that you have acted in accordance with these instructions and as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. The offenses with which the defendant is charged are: Making and using, and causing to be made and used a false bill, account, claim and certificate—sugar ration check—in a matter within the jurisdiction of an agency of the

United States; and illegal use and transfer of ration documents.

In this connection, you are instructed that the [173] indictment on file herein is a mere charge or an accusation against the defendant, and is not any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence. And the jury are the exclusive judges of his credibility. [174]

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause

on trial. A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but willfully and with the design to deceive, must treat all his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some fact or facts otherwise known or established by the evidence.

You must not consider as evidence or law any statements, arguments, comments or suggestions made by counsel during the trial. However, if counsel for either side have admitted, or stipulated to the existence of any fact, you must consider it proved without further evidence. You must not consider, for any purpose, any evidence offered and rejected, or which, after being received, has been stricken [175] out by the court. You must decide the case solely upon the evidence before you and the inferences which you may deduce therefrom, as they are stated in these instructions, and upon the law, as given you in these instructions.

The law does not require any defendant to prove his innocence, which, in many cases might be impossible. On the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find the defendant not guilty.

Reasonable doubt is not a mere possible doubt. Because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

While the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the [176] credibility and effect and value of the evidence of any other witness is determined. And the test for determining the credibility of witnesses as given you in another part of this instruction are to be applied to his testimony alike with that of other witnesses.

There are two kinds of evidence by which the Government may sustain the charges made in an indictment—the one is known as direct and positive; the other, as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the case. Evidence is said to be indirect or circumstantial, on the other hand, when the witnesses testified to matters having only an indirect or circumstantial relationship to the issues in the case.

The law requires that all the circumstances necessary to show guilt must, themselves, be shown by evidence

beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with a defendant's guilt and that they must all be inconsistent with any reasonable theory or hypothesis except that of guilt.

If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty. If it fails to do so, in any one [177] of such particulars, your verdict should be not guilty.

The defendant is charged in the indictment in this case on 12 counts. The first seven of these counts charging violation of Title 18 of the U. S. Code, Section 80, which provides in part as follows:

“* * * whoever shall knowingly and willfully
* * * make or use, or cause to be made or used,
any false bills, receipts, vouchers, rolls, account,
claim, certificate, affidavit or deposition, knowing the
same to contain any fraudulent or fictitious state-
ment or entry in any matter within the jurisdiction
of any department or agency of the United States
Government * * * shall be punished as pro-
vided by law.”

The first seven counts of the indictment charge that the defendant on the dates indicated in these counts, knowingly and willfully made and used and caused to be made and used, false bills, accounts, claims, and certificates, namely, sugar ration checks in the amounts stated in these seven counts of the indictment, which checks were alleged to be drawn on the Santa Monica

and Vermont Branch of the Bank of America, and bearing the signature as maker, of James M. Fly, on behalf of the Italian-American Import Company, knowing the same to contain fraudulent and fictitious statements, in a matter within the jurisdiction of the Office of Price [178] Administration, an agency of the United States Government, namely, Sugar Ration Accounts, kept pursuant to the provisions of the Third Revised Ration Order No. 3, promulgated by said agency pursuant to law, in that at said time and place there was no sugar ration account in the name of the defendant personally, or in the name of the Italian-American Import Company in the Santa Monica and Vermont Branch of the Bank of America.

All the first seven counts are the same type of offense except that different checks and different dates were involved.

Counts 8 to 12, inclusive, charge a series of violations of the Second War Powers Act of 1942, as amended, and the ration orders issued under it. In these five counts it is charged that the defendant willfully used and transferred sugar ration checks drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly, on behalf of the Italian-American Import Company, payable to Smart & Final, Limited, Unit 65, 834 West Jefferson Street, Los Angeles, California, in exchange for the amounts of sugar stated on the various checks in a way and for a purpose not permitted by a ration order in

that at the time these checks were used and transferred, there was no sugar ration account in the name of the defendant as an individual, or in the name of the [179] Italian-American Import Company, in the Santa Monica and Vermont Branch of the Bank of America.

Each of the counts in the indictment relates to a different transaction, making a total of 12 difference checks and 12 different occasions.

Count 1, involves a check for 10,000 pounds of sugar.

Count 2, involves a check for 1,500 pounds of sugar.

Count 3, involves a check for 1,600 pounds of sugar.

Count 4, involves a check for 3,500 pounds of sugar.

Count 5, involves a check for 10,000 pounds of sugar.

Count 6, involves a check for 10,000 pounds of sugar.

Count 7, involves a check for 5,000 pounds of sugar.

Count 8, involves a check for 5,000 pounds of sugar.

Count 9, involves a check for 5,000 pounds of sugar.

Count 10, involves a check for 2,500 pounds of sugar.

Count 11, involves a check for 3,000 pounds of sugar.

Count 12, involves a check for 2,500 pounds of sugar.

The court instructs you that a sugar ration check of the type involved in the first seven counts of the indictment is a bill or claim under the law under which these counts are drawn.

So that, concerning each of the counts 1 to 7, inclusive, of the indictment, if you believe beyond a reasonable doubt that the defendant James M. Fly, on or about the dates alleged in the indictment, knowingly and willfully made [180] or caused to be made or caused to be used, a false bill, or claim, to-wit, sugar ration checks as indicated in each of said counts drawn on the Santa Monica and Vermont Branch of the Bank of America, and bear-

ing the signature, as maker, of James M. Fly on behalf of the Italian-American Import Company, knowing the same to contain a fraudulent or fictitious statement or entry, in that at said times there was no sugar ration account in the name of defendant James M. Fly, also known as James M. Mosca, or in the name of the Italian-American Import Company in the Santa Monica and Vermont Branch of the Bank of America, then you will convict the defendant of the offense charged in that count.

But if you have any reasonable doubt as to whether any one or more of the elements I have read to you have been proved under any count or counts you will acquit the defendant as to that count or counts.

Although the first seven counts of the indictment charge that the defendant made and used, and caused to be made and used, a false bill, account, claim and certificate, to-wit, sugar ration checks, it is not necessary that the evidence show that the defendant did all four of these things, it being sufficient proof of the defendant's guilt if you find beyond a reasonable doubt, in conformity with all the other instructions of this court, that the defendant knowingly and willfully, either made or used, or caused to be made or used, such [181] false bill, account, claim and certificate, to-wit, the sugar ration checks involved.

Third Revised Ration Order No. 3, provides in part as follows:

"ARTICLE XV—Ration Banking

"Section 15.1. How accounts are authorized. Revised General Ration Order 5 and this Order require certain persons and permit others to have ration bank accounts. Only these persons may become depositors and they may open only the ac-

counts specifically authorized by or under Revised General Ration Order 5 and this order.

“Section 15.2. Separate depositor as to each account. Each person who opens more than one account is deemed to be a separate depositor as to each of his accounts.

“Section 15.3. How many accounts permitted. Not more than one account for any one establishment may be opened for sugar unless authorized by the Office of Price Administration.

“Section 15.4. Accounts opened where dollar accounts carried. Every account opened for any establishment must be opened at a bank carrying a dollar checking account for that establishment, unless otherwise authorized by the Office of Price [182] Administration.

“Section 15.5. Signature cards and other papers required. A person shall open his first account by signing and delivering to the bank completed signature cards supplied by the bank. He may open any additional account in the same bank by furnishing such additional signature cards as the bank may request. He may change the authorized signatures for an existing account by signed notice to the bank, and by furnishing such signature cards as the bank may request. He shall also, in all cases, furnish such references, proofs of identity and documents showing his authority to execute the signature cards as the bank may request.

“Section 15.6. Deposits (a). What to be deposited. A depositor shall deposit all evidences which are in his possession when he opens his account, or are thereafter accepted by him, in the

account carried for the establishment by or for which the evidences were received, and may not transfer them to any person for any purpose, unless otherwise provided by the Office of Price Administration. However, he shall not deposit in his account any evidence which has not yet become valid or which no longer is valid for deposit. [183]

“(b) How deposits are made. All ration evidences presented for deposit must be in the form prescribed by Revised General Ration Order 5 or this Order and accompanied by a deposit slip filled out in duplicate, in the form prescribed by the Office of Price Administration indicating each item deposited by type and amount, and in the case of a check, by transit number, unless permission to omit the transit number is granted by the Office of Price Administration. All evidences must be endorsed by the depositor before being deposited.

“(d) Person who fails to open a required account shall not transfer evidences. A person who is required to open an account but does not do so may not transfer ration evidences to any person for any purpose.

“Section 15.7. Issuance and use of checks. (a) When check to be issued. A check may be issued only by a depositor and only for a purpose permitted and with the effect prescribed by Revised General Ration Order 5 or this Order authorizing the account on which the check is drawn.

“Section 15.8. (d) (b) How checks are issued. Each check and its stub must be completely filled out before the check may be issued, but a check [184] register, duplicate voucher or any similar record

may be used in place of the check stub. Both check and stub or other record must contain the name of the person to whom the check is to be issued, and the date on which it is drawn and the amount of credits to be transferred. The check must bear the name of the account and the depositor's authorized signature or signatures.

"Section 22.10. Unlawful use or possession. No person shall at any time either use or have in possession or under his control or take delivery of any sugar, checks, coupons, stamps or ration books, where such possession, control, or acquisition is in violation of this Order.

"Section 22.13. (b) * * * unless expressly permitted by this Order or otherwise authorized by the Office of Price Administration, no person may surrender evidences except to authorize a delivery of sugar.

"Section 25.1. Meaning of terms used in this Order. Whenever the provisions of this Order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, rights and privileges shall be considered as being conferred or imposed upon the [185] person owning such establishment or registering unit with respect thereto."

The Second War Powers Act of 1942, as it applied during the period involved in this case, provides in part as follows:

"* * * whenever the President is satisfied that the fulfilment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or

for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The Act also provides that:

"Any person who willfully performs any act prohibited or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation or order, thereunder, whether heretofore or hereafter issued, shall be guilty of"

an offense * * *.

The Second War Powers Act, as applicable in this case, also provides in part: [186]

"The President may exercise any power, authority or discretion conferred on him by this subsection (a), through such departments, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

I instruct you that at all times material to this case, the Office of Price Administration was the agency which was given the power to ration sugar and to prescribe regulations as to such rationing, and that it did so.

I instruct you that a sugar ration account kept in banks pursuant to the provisions of Third Revised Ration Order No. 3, promulgated by said agency is a matter within the jurisdiction of an agency of the United States, namely, the Office of Price Administration.

Among the ration regulations promulgated under the authority of the Second War Powers Act of 1942, upon

which the last five counts of the indictment are based, are General Ration Order No. 8 and Third Revised Ration Order No. 3. I instruct you that these ration orders were in effect on all dates material to this case.

General Ration Order No. 8 in part provides as follows:

“Section 2.6. * * * No person shall acquire, use, permit the use of, possess or control a ration document except the person or the agent of the person [187] to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.”

Concerning each of Counts 8 to 12, inclusive, of the indictment, if you believe beyond a reasonable doubt that the defendant on or about the dates alleged in the indictment willfully used or transferred a sugar ration check as charged in each such Counts in the indictment, in a way or for a purpose not permitted by a Ration Order in that at such times there was no sugar ration account in the name of the Defendant James M. Fly, also known as James M. Mosca, or in the name of the Italian-American Import Company in the Santa Monica and Vermont Branch of the Bank of America, then you will convict the defendant of the offense charged in that count or counts.

But, if you have any reasonable doubt as to whether any one or more of the elements I have read to you have been proved under any count or counts, you will acquit the defendant as to that count or counts.

In every criminal offense there must be concurrence of act and intent. This is especially true in an offense like the present one which requires that the Act shall be [188] done knowingly and willfully. This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt.

In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant, as well as his declarations or admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations and admissions, as shown by the evidence, considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt.

You will note that under the indictments the acts are alleged to have been done knowingly, and willfully, as to the first seven counts or willfully as to the last five counts.

Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

The word "willfully" denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right to so act. [189]

In order to convict the defendant of a crime charged in the indictment, it is not necessary that the evidence show that he, himself, committed each and every step necessary to the completion of each crime charged, nor that he was

the sole or even the dominating actor in the commission of the offense, but it is sufficient if you find that partly by himself and partly through other persons or with their help he aided in the criminal act charged. In this connection Section 332 of the Criminal Code reads as follows:

“Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.”

To aid means to further the interests or designs of another by assistance or cooperation, to give support, help to another, to assist.

To abet means to encourage, instigate or countenance.

Taken together the words as used in this statute are to be understood, as used in common parlance, according to the dictionary definition I have just given. They import assistance, cooperation, and encouragement of another in the commission of a prohibited act.

Conviction for the offenses charged in this indictment [190] may be based on evidence of accomplices.

An accomplice is a person who has knowingly participated in the acts charged as constituting the offense whether he is actually indicted or not. The witness Fred Peterson is an accomplice.

The testimony of an accomplice should be scrutinized carefully by the jury and you should act upon it with caution and care. However, if you believe such testimony and it carries conviction to you, it is sufficient, even in the absence of any corroborating evidence, to warrant a conviction, provided that from all the evidence, including that of the accomplice, you are convinced beyond a reasonable doubt of the guilt of the defendant.

Your first duty upon retiring to the jury room will be to select one of your number to act as foreman.

A jury in a Federal Court is what is known as a common law jury. It requires unanimity in all cases, both in civil and criminal cases and this is a criminal case and you will be governed by that rule. All 12 of you must agree upon a verdict before any verdict can be returned.

For your assistance the clerk has prepared a form of verdict which reads as follows:

Title of court and cause. "Verdict: We the jury in the above entitled cause find the defendant James M. Fly blank as charged in count one of the [191] indictment; and blank as charged in count two of the indictment; and blank as charged in count three of the indictment; and blank as charged in count four of the indictment; and blank as charged in count five of the indictment; and blank as charged in count six of the indictment; and blank as charged in count seven of the indictment; and blank as charged in count eight of the indictment; and blank as charged in count nine of the indictment; and blank as charged in count ten of the indictment; and blank as charged in count eleven of the indictment; and blank as charged in count twelve of the indictment; dated September blank 1947; blank foreman of the jury.

If you find the defendant guilty of count one of the indictment you will insert the word "guilty" in the place opposite that count. If you find him not guilty you will insert the words "not guilty".

If you find him guilty of count two you will insert the word "guilty" at that place, and if you find him not guilty you will insert those words. And without repeating it again that applies to every count, 1 to 12. As to each of these counts you will have to insert the proper word or words depending upon your verdict, either guilty or not guilty.

While, as I have stated, you must return a verdict [192] on all counts unless the court for good reason should agree to accept a verdict on less than all the counts of the indictment, it is not necessary that your verdict be the same. In other words, you may find a verdict as to one count and another verdict as to another count. You may find the defendant guilty as to one count and not guilty as to another count. Of course that doesn't apply only to the two groups, that is the first seven or the last five. It applies to any one within the group. You are free to find whatever verdict you desire on any of these counts depending upon the conviction you have arrived at.

Are there any objections to the instructions given the jury? If so the jury will be excused.

Mr. Carr: Before you excuse the jury I would like to request an additional instruction. I thought you usually gave it. That is the instruction where they are to consult with each other.

The Court: That is right, I did not give that. I will do so now.

I shall give you now the instruction which has been suggested by counsel.

You are instructed that the Government and the defendant are entitled to the individual opinion of each juror on the issue of fact in this case. It is the duty of each

of you to consider and weigh all the evidence in the [193] case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced that you are right, it will be your duty to stand by your decision. But each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom; this it is his duty to do. If, after such a full and fair discussion with them, any juror is still satisfied that his decision is right, he should say so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision, and render his verdict according to his final decision.

Mr. Carr: Now, your Honor, I do have one or two objections. Shall I wait until you excuse the jury?

The Court: We will have to excuse the jury while you are presenting your objections. The jury will be excused for a few minutes.

(Whereupon, the jury retired from the courtroom.)

The Court: Let the record show the jury has withdrawn. [194]

Mr. Carr: My first objection is, just for the record, to the instruction that the check under Counts 1 to 7 are bills or a claim. We have dealt with that at length and I do not need to more fully state my reasons. It is simply our contention it is not a bill or a claim.

The Court: All right.

Mr. Carr: Now, Instruction No. 11 says that although the first seven counts of the indictment charge the defendant made and used and caused to be made and used false sugar ration checks,—I don't know how it has been changed. It is not necessary that the evidence show the defendant did all four of these things?

The Court: That is right. That is the usual instruction because the statute is in the conjunctive.

Mr. Carr: I just felt it was a little bit confusing.

The Court: No, it isn't. It simply tells them that whether he caused it to be done or any of the four elements it is sufficient. That is all that is necessary when you have a statute which is in the conjunctive. In other words, they have not chosen any one of the four elements; they have charged them all so I am telling the jury that they can convict, if they are satisfied that he did it himself or caused it to be done and then of course with that you add the instruction on principals and the definition of the words "aid and abet". There can be no confusion. [195]

Mr. Carr: Very well, your Honor. Now, Instruction 8, at page 9 of the Government's requested instructions, I must object to the reading of Section 15.7 and Section 22.10 for the reason that in hearing your Honor read that I believe that it will confuse the jury into thinking that they may convict if the facts show a violation of 15.7 or Section 22.10.

The Court: These relate to the last count which make it unlawful to take delivery of such possession. Those are the penalty parts of those sections.

Mr. Carr: He is charged with violation of 2.6. That is where I think the confusion lies and I think the jury might well be confused into believing, no matter how he violated the ration order, he is guilty, and that is not the charge in the last five counts.

That is my objection to Section 15.7 and Section 22.10.

The Court: That is required under the Corson case.

Mr. Carr: I think the Corson case is wrong.

The Court: I know it is wrong but I cannot convince the Circuit Court of Appeals it is wrong. I think it is wrong and I have said so in writing at least twice and in talking to the judges themselves, but they say that the entire ration order should be read so that they would know under what condition lawful possession may be had. [196]

I am sorry I am compelled to do that.

Mr. Carr: The only other instruction that I wish to object to at this time is Instruction 10 and that is the instruction which uses the words, "False bill, account, claim or certificate." The page is not numbered. It starts off, "Concerning each of counts 1 to 7, inclusive," and so forth. It is the same objection that went to the other instructions with respect to a bill or a claim.

The Court: I could not eliminate those words because it would not be a correct paraphrasing of the indictment. That is the form we used before the Corson case where

we merely gave the elements of the offense without repeating them. The Supreme Court of California has held that that is a good instruction. In a murder case you do not have to say, "Murder is the unlawful taking of human life with malice aforethought." You can say, "If you believe on such and such a day John Smith killed so and so with malice aforethought he is guilty of the offense." But in the Corson case they say, "No, you have got to tell them it is the law."

Mr. Carr: That is the end of my suggestions, your Honor.

Mr. Bell: I have one, your Honor, so it will be on the record. It is in connection with Government's Instruction 8, page 9, the failure to give that portion of Regulation 15.8, Section 15.8, followed by (d) and (b) and then (d) under [197] that:

"No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

The Court: I agree with Mr. Carr that that might be confusing because there is no charge of an overdraft. Of course it was argued by Mr. Carr that it may have been just an overdraft but there is no charge of overdraft. He is charged with having no account in the name under which he drew checks and we have to stick with that.

Mr. Bell: That is my only suggestion.

The Court: All right, call the jury.

(Whereupon, the jury returned to open court.)

The Court: All right, ladies and gentlemen of the jury, so you will understand the proceedings we have just had while you were absent from the courtroom is this. Under the law the attorneys for both sides have the privilege of objecting to any instruction given by the court to the jury or an objection to the court's failure to give any instruction requested by either side. That has to be done outside the presence of the jury. In that manner the court is given an opportunity to supply the missing instructions if he deems they are proper. Furthermore, it is the only place in the record and in the proceeding where they can do so. That is [198] what took place in this case during your absence. However, I have not modified my instructions to you in any manner whatsoever. The instructions stand as I have given them to you and if you desire the manuscript of the instructions sent to you after beginning your deliberations they will be sent to you if you make that request to the bailiff.

The clerk will swear the bailiff.

(Whereupon, the bailiff was sworn by the clerk.)

The Court: Ladies and gentlemen of the jury, you will now find the bailiff and you will begin your deliberations in the case. I hand to the bailiff the form of verdict.

(Whereupon, the jury retired from the courtroom.)

The Court: We will stand in recess until we hear from the jury.

The Court: Let the record show the jury in the case of United States versus James M. Fly, No. 19,342, have returned to the courtroom and the defendant is in court with his counsel.

Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have, your Honor.

The Court: Will you send the verdict to the court through the bailiff?

The clerk will read the verdict.

The Clerk: "United States District Court, Southern [199] District of California, Central Division. United States of America, plaintiff, versus James M. Fly, charged as James M. Mosca, defendant, No. 19,342 Criminal Verdict.

"We the jury in the above entitled cause, find the defendant, James M. Fly, guilty as charged in Count 1 of the indictment; and guilty as charged in Count 2 of the indictment; and guilty as charged in Count 3 of the indictment; and guilty as charged in Count 4 of the indictment; and guilty as charged in Count 5 of the indictment; and guilty as charged in Count 6 of the indictment; and guilty as charged in Count 7 of the indictment; and guilty as charged in Count 8 of the indictment; and guilty as charged in Count 9 of the indictment; and guilty as charged in Count 10 of the indictment; and guilty as charged in Count 11 of the indictment; and guilty as charged in Count 12 of the indictment. Dated September 25, 1947. William J. Doran, Foreman of the Jury."

Ladies and gentlemen of the jury, is this verdict as presented and read the verdict of each of you? So say you all.

The Foreman: Yes, your Honor.

The Court: Do you desire the jury be polled individually?

Mr. Carr: No, I do not desire that, your Honor.
[200]

(Whereupon, the jury was dismissed.)

[Endorsed]: Filed Nov. 12, 1947. Edmund L. Smith, Clerk. [201]

[Endorsed]: No. 11753. United States Circuit Court of Appeals for the Ninth Circuit. James M. Mosca, otherwise known as James M. Fly, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 17, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11753

JAMES M. MOSCA, otherwise known as
JAMES M. FLY,

Defendant and Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

ORDER OF COURT TO CONSIDER ORIGINAL
EXHIBITS

It appearing that James M. Mosca, otherwise known as James M. Fly, Defendant and Appellant above named, has filed Notice of Appeal in the above matter and is now in the process of perfecting said Appeal;

It also appearing that Counsel for the Appellee on the 29th day of October, 1947, has consented with Attorney for Appellant herein that all the original Exhibits be forwarded by the Clerk of the U. S. District Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit;

It further appearing to the Court that on the 29th day of October, 1947, the Honorable Paul J. McCormick, U. S. District Judge for the Southern District of California, signed an order for transmission of all original Exhibits to the Ninth Circuit Court of Appeals;

It is ordered that all of the original Exhibits in the above action may be made a part of the Record on Appeal in the above-entitled matter to be considered by this Honorable Court in the within Appeal in their original form, as transmitted by the Clerk of the U. S. District Court.

Dated: This 3d day of December, 1947.

FRANCIS A. GARRECHT

Judge, U. S. Circuit Court of Appeals for the
Ninth Circuit.

[Title of Circuit Court of Appeals and Cause]

APPLICATION FOR ORDER OF COURT TO
CONSIDER ORIGINAL EXHIBITS

Comes now James M. Mosca, otherwise known as James M. Fly, Defendant and Appellant above named, by and through his attorney, Charles H. Carr, and makes application to this Honorable Court as follows:

That this Honorable Court consider as a part of the Record on Appeal all original Exhibits in the above named action which have been transmitted by the Clerk of the U. S. District Court for the Southern District of California to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit and which have not been made a part of the printed record.

This application is being made upon the ground that it would be impractical and costly to include them all in the printed record.

Dated: December 1, 1947.

Respectfully submitted,

CHARLES H. CARR

Attorney for Defendant and Appellant

Received copy of the within Order of Court to Consider Original Exhibits and Application for Order of Court to Consider Original Exhibitions this 2 day of December, 1947. James M. Carter, U. S. Attorney, Attorney for Appellee, United States of America, by Velonis Bonhus.

[Endorsed]: Filed Dec. 3, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON APPEAL

Appellant, James M. Mosca, otherwise known as James M. Fly, herewith sets forth a concise statement of the points on which he intends to rely on this appeal, viz.:

I.

The District Court erred in denying Appellant's Motion to Dismiss the Indictment.

II.

The District Court erred in denying Appellant's Motion for a Judgment of Acquittal made under Rule 29 of the Federal Rules of Criminal Procedure.

III.

The District Court erred in admitting into evidence Government's Exhibit No. 13.

IV.

The District Court erred in admitting the testimony of Fred Peterson, a witness for the Government, concerning alleged arrangements he made with Appellant to destroy checks.

V.

The District Court erred in giving Government's Requested Instruction No. 8.

VI.

The District Court erred in giving Government's Requested Instruction No. 10.

VII.

The District Court erred in instructing the jury that the sugar ration checks involved in the first seven counts of the Indictment were bills or claims under Section 80, Title 18, U. S. C. A.

CHARLES H. CARR

Attorney for Appellant

Received copy of the within * * * Statement of Points on Which Appellant Intends to Rely on Appeal this 2 day of December, 1947. James M. Carter, U. S. Attorney, Attorney for Appellee, United States of America, by Velonis Bonhus.

[Endorsed]: Filed Dec. 3, 1947. Paul P. O'Brien, Clerk.

No. 11753.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as JAMES M. FLY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT.

CHARLES H. CARR,
675 Subway Terminal Building, Los Angeles 13,
Attorney for Appellant.

FILED

APR 8 - 1948

PAUL J. DOWEN,
CLERK

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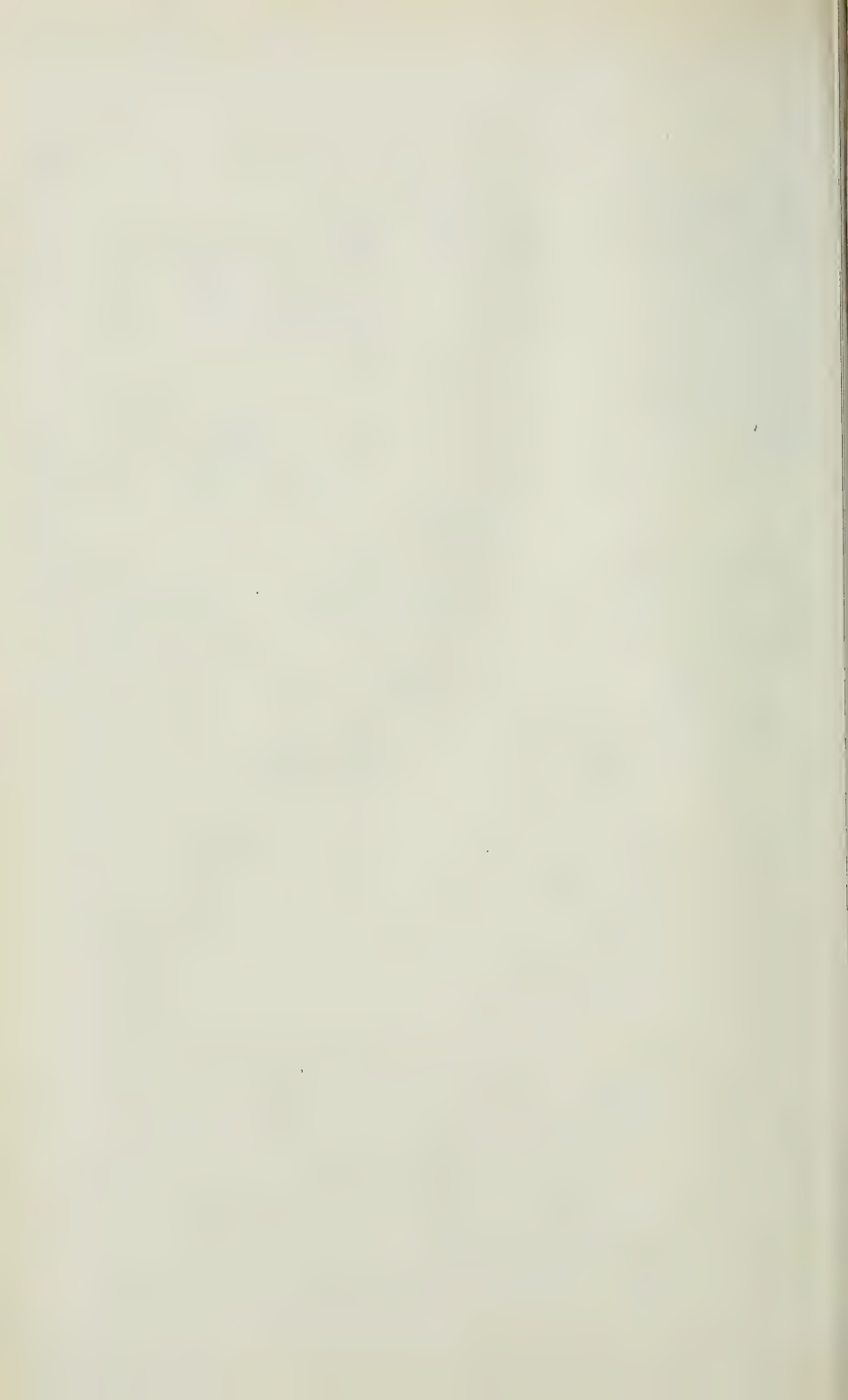
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No. 11753.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as JAMES M. FLY,
Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT.

Jurisdictional Statement.

This is an appeal from a Judgment of Conviction in the United States District Court for the Southern District of California on September 25, 1947, after trial before a jury, wherein the Appellant was found guilty on all twelve counts of an Indictment.

The first seven of the counts in the Indictment charged the Appellant with having violated Section 35(A) of the Federal Criminal Code, 18 U. S. C. A. 80, during October and November, 1946, in Los Angeles County, California, which section prohibits the making and using of a false bill, account, claim or certificate, knowing the same to contain a fraudulent or fictitious statement in a matter within the jurisdiction of any department or agency of the United States. [R. 2-7.]

In the remaining five counts of the Indictment, Appellant is charged with having willfully used and transferred

ration documents; namely, sugar ration checks, on different days in October and November, 1946, in Los Angeles County, California, in exchange for sugar, in a way and for a purpose not permitted by a ration order, in violation of General Ration Order 8, Sec. 2.6 (8 F. R. 3783), issued pursuant to the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633. [R. 7-10.]

The jurisdiction of the District Court was based upon the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633 (6).

This Court has jurisdiction to entertain this appeal under Sec. 128 of the Judicial Code as amended, 28 U. S. C. A. 225.

Statement of the Case.

The Appellant was convicted after trial before a jury in the United States District Court for the Southern District of California at Los Angeles, California, on September 25, 1947. [R. 13.] The jury found the Appellant guilty on all counts of a 12-count Indictment, the first seven counts of which purport to charge the Appellant with eight separate violations of Sec. 35 (A) of the Federal Criminal Code, 18 U. S. C. A. 80, and the remaining five counts of the Indictment purport to charge the Appellant with five separate violations of Sec. 2.6 of General Ration Order No. 8 (8 F. R. 3783) issued by the President through the Office of Price Administration, pursuant to 50 U. S. C. A. App. Sec. 633. [R. 2-10.]

Specifically, Count One of the Indictment charged that the Appellant, on or about November 11, 1946, in Los Angeles County, California, did knowingly and willfully make and use, and cause to be made and used, a

false bill, account, claim and certificate, to-wit: a sugar ration check, in the amount of 10,000 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of the Appellant on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement, and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government; namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 (11 F. R. 177) promulgated by said agency pursuant to law in that at said time and place, there was no sugar ration account in the name of the Appellant or the Italian American Import Co. in the Santa Monica and Vermont Branch of the Bank of America. [R. 2-3.]

Counts Two, Three, Four, Five, Six and Seven are similar to Count One except that the date of the offense charged is different and each count refers to a different sugar ration check. [R. 3-7.]

Count Eight charged that the Appellant, on or about November 30, 1946, in Los Angeles, California, willfully used and transferred ration documents, to-wit: two sugar ration checks drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of the Appellant on behalf of the Italian American Import Co., purporting to transfer 2500 pounds of sugar each to Smart & Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 5000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of the Appellant or the Italian American Import

Co. in the Santa Monica and Vermont Branch of the Bank of America. [R. 7.]

Counts Nine, Ten, Eleven and Twelve are similar to Count Eight except for the date charged in each count, and each count refers to a different sugar ration check. R. 8-10.]

All of the offenses alleged in the Indictment are stated to have occurred on different dates in October and November, 1946.

Prior to trial, the Appellant moved to dismiss the Indictment and directed the motion particularly to the first seven counts of the Indictment which purported to charge a violation of 18 U. S. C. A. 80. This motion was denied by the Court, a plea of not guilty to each count was entered by the Appellant and the cause set for trial on July 22, 1947. [R. 11.]

The cause proceeded to trial on September 23, 1947 [R. 24], and was concluded on the following day when the jury returned a verdict of guilty on all twelve counts. [R. 12-13.]

At the conclusion of the case for the Government, the Appellant moved for a judgment of acquittal as to all counts of the Indictment, which motion was denied. [R. 130-146.] The Appellant renewed his motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure which motion came on for hearing on October 3, 1947, and was denied. [R. 14-15.]

The Court sentenced the Appellant to imprisonment of one year on each of the first seven counts of the Indictment, the sentence of Counts Two to Seven, inclusive, to run concurrently with the sentence on Count One, and to imprisonment for one year on Count Eight, the term

of imprisonment to run consecutively with the sentences on Counts One to Seven, inclusive, and Appellant was ordered to pay a fine of \$10,000.00 on Count Nine, a fine of \$5,000.00 on Count Ten, a fine of \$5,000.00 on Count Eleven, and a fine of \$5,000.00 on Count Twelve, to stand committed until the fines are paid. [R. 16-17.]

Notice of Appeal was filed on October 9, 1947. [R. 18.]

Summary of the Facts.

During 1946, Appellant, as the sole proprietor, operated three places of business in Los Angeles, California. At 4356 Sunset Boulevard the business was called the Italian-American Delicatessen. He had a cafe on Riverside Drive and a delicatessen at 8279 Santa Monica Boulevard. [R. 35, 68.]

Appellant's sugar ration account was carried at the Santa Monica and Vermont Branch of the Bank of America in the name of James M. Fly doing business as the Italian-American Delicatessen. [R. 63, 68, 84.] Appellant was registered with the Office of Price Administration in the name of James M. Fly doing business as the Italian-American Delicatessen. [R. 68.]

Although Appellant's sugar ration account at the Bank of America was in his name doing business as Italian-American Delicatessen Company, the bank charged the sugar ration checks, which are in evidence as Government's Exhibits 1 to 12, both inclusive, and signed Italian-American Import Company, to the sugar ration account of appellant. [R. 64, 106, 107.]

Government's Exhibits 1 to 12, both inclusive, purported to be sugar ration checks issued by Appellant on the Santa Monica Branch of the Bank of America and were signed Italian-American Import Company by James

M. Fly. Government's Exhibits 1 to 6, both inclusive, were written by Appellant and transferred to one William H. Austin, manager of Unit W for Smart & Final Company. [R. 30.] Government's Exhibit No. 7 was signed by Appellant and delivered to the witness Honigs, who, in turn, delivered it to the witness Walsma. [R. 40.] Government's Exhibits 8 to 12, both inclusive, were received by the witness Ripley, manager of Unit 65 for Smart and Final Company. [R. 51.]

Lawrence M. Taylor, special agent of the Office of Price Administration, told Snodgress, employee at the Bank, that Snodgress ought to recompute the figures on Government's Exhibit 13 because he, Taylor, stated that the checks did not belong in that account. [R. 102.] After the conversation with Taylor, Snodgress recomputed the figures on Government's Exhibit 13. [R. 99-104.] Snodgress testified that he corrected the figures on Government's Exhibit 13 based on what Taylor told him. The witness Snodgress indicated what figures he had placed on Government's Exhibit 13 after talking to Taylor by marking a line across the page at the top, being the original record, and the bottom the corrected part. [R. 93-4.]

Evidence was introduced over the objection of the Appellant by the witness Fred Peterson to the effect that from about the first of 1946 up to the end of October, 1946, the Appellant had an understanding with the witness, who was then an employee of the Bank of America and in charge of sugar ration accounts at the Santa Monica and Vermont branch of said Bank, whereby Peterson would set up fictitious deposits in the account of the Italian-American Delicatessen with the Bank of America and would destroy sugar ration checks drawn by the Appellant when they came into the Bank so that the record

would show a balance in the account at all times and not an overdraft. [R. 116-124.]

The Appellant took the stand in his own defense and produced Defendant's Exhibits A-1 and A-2, which were received in evidence.

Defendant's Exhibit A-1 is the letter from the Office of Price Administration to the Italian-American Delicatessen Company, dated February 10, 1947, which advised that Appellant's account in the Bank of America had a balance of 1,490 lbs. of sugar on February 8, 1947, at the time when the account was closed. Exhibit A-2 is the envelope showing the registered mail stamp in which Exhibit A-1 was received by Appellant.

Specifications of Error.

I.

The District Court erred in denying Appellant's Motion to Dismiss the Indictment.

II.

The District Court erred in denying Appellant's Motion for a Judgment of Acquittal made under Rule 29 of the Federal Rules of Criminal Procedure.

III.

The District Court erred in admitting the testimony of Fred Peterson, a witness for the Government, concerning alleged arrangements he made with Appellant to destroy checks.

IV.

The District Court erred in instructing the jury that the sugar ration checks involved in the first seven counts of the Indictment were bills or claims under Section 80, Title 18, U. S. C. A.

ARGUMENT.

SPECIFICATION OF ERROR I.

The District Court Erred in Denying Appellant's Motion to Dismiss the Indictment.

Under specification of error II, Appellant has, in addition to the other points raised there, also presented substantially the same argument respecting the sufficiency of the indictment as was made in support of the Motion to Dismiss, and it is, therefore, adopted here.

SPECIFICATION OF ERROR II.

The District Court Erred in Denying Appellant's Motion for a Judgment of Acquittal Made Under Rule 29 of the Federal Rules of Criminal Procedure.

The first seven counts of the Indictment purported to charge offenses under Section 80 of Title 18, U. S. C. A. It was the theory of the Government that Appellant made and used a false bill, account, claim or certificate by having signed a sugar ration check Italian-American Import Co. by James M. Fly knowing that the same contained a fraudulent and fictitious statement or entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States, because there was no sugar ration account in the name of Appellant or the Italian-American Import Co. in the Bank of America. Appellant contended that a sugar ration check, whether or not drawn on Appellant's account, was not a false bill, account, claim or certificate within the meaning of Section 80.

The pertinent part of this section provides as follows:

“* * * or whoever shall knowingly and willfully * * * make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined * * *.”

In order for the sugar ration checks upon which the first seven counts of the Indictment are predicated to fall within the purview of Section 80 of Title 18, U. S. C. A., they must necessarily be, as charged, a false bill, account, claim or certificate. It was not contended by the Government that a ration check would be included within the terms “account” or “certificate,” and the District Court instructed the jury that a sugar ration check of the type involved in the first seven counts of the Indictment “is a bill or claim under the law under which these counts are drawn.” [R. 162.]

It thus appears that the sufficiency of the Indictment, in so far as the first seven counts are concerned, depends upon the interpretation of the terms “bill” or “claim.” If a sugar ration check is neither, no offense is stated.

On the argument for the Motion to Dismiss, counsel for the Government, and, as a matter of fact, Appellant’s counsel argued the Motion almost entirely respecting the interpretation which should be placed upon the term “bill.” Later in the trial, as heretofore mentioned, the District Court instructed the jury that such checks were either a bill or claim.

It is the contention of Appellant that a sugar ration check is not a bill or a claim within the meaning of the statute. No support for the Government's position is found in any permissible or reasonable interpretation of the terms "bill" or "claim" or in the legislative history of the section in question.

The history of Section 80 discloses that the section, in its present form, has developed from a series of amendments to the original act of March 2, 1863, Ch. 67, 12 Stat. 696, the pertinent part of which provides as follows:

"Any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining the approval or payment of such claim, make, use, or cause to be made or used, any *false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition*, knowing the same to contain any false or fraudulent statement or entry, * * *." (Emphasis supplied.)

This original Act was not amended until May 30, 1908, R. S. 5438, Ch. 235, 35 Stat. 555, when it provided as follows:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil,

military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; or whoever for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any *false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition*, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, etc.”

It is noted that the changes by the amendment of May 30, 1908, extended the statute to “every person,” doing away with the limitation of applicability contained in the original statute to any person “in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war,” and further the presentation of any claim was extended to a “person or officer” in the naval as well as the civil or military service. Also, the word “entry” was dropped from the proscribed categories obviously to avoid repetition, since it appeared in subsequent language. Also, a conspiracy clause was added.

This Act was further amended on March 4, 1909 (Ch. 321, 35 Stat. 1095), by Section 35 of the Criminal Code. The pertinent portion of the section was not changed further by the Act of March 4, 1909, except to substitute the word “Whoever” for “Every person” at the beginning.

By the Act of October 23, 1918 (Ch. 194, 40 Stat. 1015), the section was further amended.

By this amendment, the Act was extended to include the presentation of any claim to any department of the Government of the United States "or any corporation in which the United States of America is a stockholder" and the provision was added "or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact * * * shall be fined * * *."

The section was further amended by the Act of June 18, 1934, Ch. 587, 48 Stat. 996, by the addition of the words making it an offense to make or cause to be made a false statement or representation "in any matter within the jurisdiction of any department or agency of the United States." The Act, as amended April 4, 1938, Ch. 69, 52 Stat. 197, is the present law as used in the first seven counts of the Indictment. The last amendment, however, did not change the Act as amended June 18, 1934, except for a slight change in punctuation.

It is significant that from its inception there was no change in this legislation in so far as the description of the documents proscribed are concerned. The Act has always referred to a "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition."

In the case of *United States v. Gilliland*, 312 U. S. 86, 85 L. Ed. 598, the Supreme Court considered the Act involved here, and there held that it applied to the submission of false affidavits and reports required to be kept and submitted to the Department of the Interior under the Act of February 22, 1935, 49 Stat. at L. 30, 31, Chap. 18, 15 U. S. C. A., Sections 715-715d, commonly called the "Hot Oil" Act. In that case, the Court pointed out at page 95 of the opinion that the amendment of April 4, 1938, was sought by the Department of the Interior to aid in the enforcement of laws relating to its functions and, in particular, to the enforcement of regulations under Section 9(c) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. at L. 195, 200, Chap. 90.

The letter dated February 7, 1934, directed to the Chairmen of the Judiciary Committees of the Senate and House by the Secretary of the Interior referred to in the opinion in the *Gilliland* case, bears out the conclusion of the Court concerning the reason for the amendment of June 18, 1934.

The "sugar ration checks" referred to in the first seven counts of the Indictment were checks issued pursuant to 50 U. S. C. A. App. 633(2) and Third Revised Ration Order No. 3. (See Appendix.)

As the statute now stands, one of the offenses defined is that of wilfully making or using a false bill or claim in any matter within the jurisdiction of any department or agency of the United States. It must, therefore, be determined whether a sugar ration check is a bill or claim within the meaning of the statute.

The word "bill" has many meanings in law, depending upon words used in conjunction therewith, such as bill of discovery, bill of information, bill of review, bill of indictment, bill of sale, bill of exchange, bill of particulars, bill of rights, and many more.

A check such as those referred to in the first seven counts of the indictment is not a "bill of exchange," which is the only type of "bill" to which it can be said with reason to have even remote application, because it does not contain a promise or order to pay a sum certain *in money*. This requirement of a bill of exchange is specifically mentioned in the definition of a "bill of exchange" contained in Section 3207 of the Civil Code of California, which provides:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain *in money* to order or to bearer." (Emphasis supplied.)

This requirement of a "bill of exchange" is recognized in a number of cases in the Federal Courts. *Nathan v. State of Louisiana*, 49 U. S. 73, 12 L. Ed. 993; *United States v. Bank of United States*, 46 U. S. 382, 12 L. Ed. 199; *Shaw v. Merchants National Bank of St. Louis*, 101 U. S. 557, 25 L. Ed. 892; *Wilson v. Buchenau*, 43 Fed. Supp. 272.

In Volume 10, *Corpus Juris Secundum* at page 381, the word "bill" is defined as follows:

"The word 'bill' is one of the most general that can be used, and has a meaning depending on the subject matter to which it is applied. It has been

said to be a word of legal import, and has been generally defined or employed as meaning a formal statement of particular things, in writing.

“More specifically, in what may be called its commercial sense, it has been defined as an account of charges and particulars of indebtedness by the creditor to his debtor, in this sense being held synonymous with, or equivalent to, ‘charge,’ ‘claim,’ ‘demand,’ and ‘invoice.’ In a somewhat different application, but still in a commercial or mercantile sense, as a medium of payment, ‘bill’ has been defined as bank note; bank paper; paper money; also as a common engagement for money, given by one man to another; a note for the absolute payment of money under seal; an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events; the term, in this latter application, being further defined and distinguished from other terms in Bills and Notes, §§4-7.”

See:

Black's Law Dictionary (3d ed.), pp. 216-222;

Bouvier's Law Dictionary (Rawle's 3d Revision), pp. 344-365.

It appears from the history of this Act that Congress intended by the use of the word “bill” to mean a “bill” in the sense of an invoice, involving a claim for money of something of value, not a “bill of exchange” or such a document as is involved here. An extension of the meaning of the word “bill” to include any check, whether strictly a bill of exchange or not, which may be addressed to the Federal government on a non-existent account or upon an account that is overdrawn, would be to give to

this section an unreasonable meaning and certainly beyond the intention of Congress in passing the legislation.

From the foregoing, it appears that, if a sugar ration check is to be brought within the meaning of any of the terms set forth in the Statute, it would necessarily have to be that of a "claim." Nothing in the history of the Section or in any of the adjudicated cases indicates that a claim has been construed other than a demand for money or for something of value from the United States.

"Claim" has been defined by the Supreme Court as "The assertion of a liability to the party making it to do some service or pay a sum of money."

Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. Ed. 1060.

In the case of *United States v. Cohn* (1926), 270 U. S. 339, 70 L. Ed. 616, the Supreme Court had before it for interpretation the act involved here as amended in 1918. In that case, the Defendant was charged with having caused false statements to be made to the customs service wherein he obtained unlawful possession of some cigars from the Collector of Customs. At pages 345, 346 of the opinion, the Court stated:

"While the word 'claim' may sometimes be used in the broad juridical sense of 'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty' (*Prigg v. Pennsylvania*, 16 Pet. 539, 615, 10 L. Ed. 1060, 1089), it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the government relates solely

to the payment or approval of a claim *for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant.* And obviously it does not include an application for the entry and delivery of nondutiable merchandise, as to which no claim is asserted against the government, to which the government makes no claim, and which is merely in the temporary possession of an agent of the government for delivery to the person who may be entitled to its possession. This is not the assertion of a 'claim upon or against' the government, within the meaning of the statute; and the delivery of the possession is not the 'approval' of such a claim." (Emphasis supplied.)

The lower court took the position that a sugar ration check, such as set forth in the first seven counts of the Indictment, was a claim within the meaning of Section 80. The reasoning appeared to be that a ration check is a demand addressed to a bank to transfer from the drawer's account a certain amount of sugar and that, as such, it is a claim just as much as if it were a claim for money. [R. 139.] The error in this process of reasoning appears to result from a false major premise—namely, that a check is a demand addressed to the bank to transfer sugar from a person's account when such is not the case. A ration account does not have sugar in it; it merely has ration points which, in turn, are merely units representing a type or kind of authorization by the Government.

Ration banking was set up as a method or system of rationing by the use of a checking account and the accounting in connection with rationing was supposedly made

SPECIFICATION OF ERROR III.

The District Court Erred in Admitting the Testimony of Fred Peterson, a Witness for the Government, Concerning Alleged Arrangements He Made With Appellant to Destroy Checks.

The witness, Fred Peterson, was called by the Government during the case-in-chief and testified that he was employed by the Bank of America, Santa Monica and Vermont Branch, as assistant cashier and chief clerk. He testified to a series of conversations he had with Appellant which began during the early part of 1946 and continued up to October, 1946. These conversations tended to show that the witness and Appellant first agreed that the witness would make fictitious deposits to Appellant's account and that later he decided it was easier to destroy checks drawn by Appellant on the account. All of these conversations occurred several months prior to the date of the offenses charged in the Indictment. The following occurred [R. 114-119]:

“Q. Where are the places at which you had conversations with him? A. Usually—well, at his store or when he would come in the bank.

Q. And by store do you mean his delicatessen store? A. Yes, sir.

Q. You also talked to him in the bank? A. Yes, sir.

Q. Do you recall seeing him at any other place? A. Oh, yes, I was with him several other places.

Q. Well, what other places do you now recall? A. Well, we would go out to dinner in the evening—things like that.

Q. Does Mr. Fly have more than one place of business? A. Yes, sir.

Q. Did you see him at any of the other places of business? A. Yes, sir.

Q. All right. Now, coming back to the earliest conversation that you can recall in the first part of 1946, can you recall who was present at the conversation? A. I don't believe anyone would be present.

Q. And you cannot now recall whether the first conversation occurred—can you recall where it did occur? A. No, sir.

Q. Will you relate that conversation?

Mr. Carr: I would like to have a date fixed.

Q. By Mr. Bell: Can you fix the date any closer? A. January or February, probably—the early part of 1946.

The Court: All right.

Q. By Mr. Bell: What was the conversation you had with him?

Mr. Carr: Object to that on the ground the conversation took place prior to the offense charged, your Honor.

Mr. Bell: This, your Honor, shows a continuing course of conduct. The conversation we intend to show was where the arrangements were made and they were continuously acted upon throughout the rest of the year.

The Court: I will reserve a motion to strike if it is not connected up.

Q. By Mr. Bell: What was the conversation, Mr. Peterson? A. In regard to the sugar account which was overdrawn at the time?

Q. Yes, what did he say and what did you say? A. He asked me if I could credit the account. I told him I could and I did.

Q. What did you do? A. Well, I credited the account with a phoney deposit.

Q. Do you recall how much it was?

Mr. Carr: I move to strike the word 'phoney.' 'Phoney' is a lingo that I don't understand.

The Court: You had better explain what you mean.

The Witness: Well, it was an invalid deposit.

Q. By Mr. Bell: Do you recall how much the deposit was? A. No.

Q. When you say it was invalid what do you mean by that? A. Well, I just—

Mr. Carr: I object to this on the ground it is asking for the witness' conclusion.

Mr. Bell: I am asking him to interpret the meaning of his word. You objected to the word he used.

Mr. Carr: I will ask the word 'invalid' be stricken, too.

The Court: He is trying to explain what he means by it. Go ahead.

The Witness: I just made it up. There was actually no credit there.

Q. By Mr. Bell: Did you make up the amount of the credit? A. Yes, sir.

Q. How about the date? Did you make that up? A. Yes, sir.

Q. And anything else on the entry that you made? A. Well, probably a transit description.

Q. And when you made that what did you put that entry upon—what kind of paper—what was the form? A. A regular sugar deposit slip.

Q. Merely as an illustration of the form and not pertaining to the figures thereon at all, did it re-

semble the form of deposit slip here which is Government's Exhibit 7-8? A. Yes.

Q. Did it read as this one does, the ration deposit slip: 'The United States of America, Office of Price Administration, Sugar Credits Deposited in' and then the name of the bank? A. Yes, sir.

Q. Did you have any other conversations around that time with Mr. Fly?

Mr. Carr: I am going to object to this line of questioning, your Honor, on the ground it is highly prejudicial. It does not relate to any issue involved in the case. It doesn't go to show intent with respect to the charge in the indictment, to-wit, that there was no bank account on which these checks were issued.

The Court: Objection overruled."

The witness was asked to relate other conversations with Mr. Fly with respect to fictitious deposits and the substance of his testimony was similar to that given above. The witness was then questioned as to conversations with Mr. Fly concerning ration checks. The testimony ran as follows [R. 118]:

"Q. The discussion as to the checks. Were any of those held in his place of business? A. The discussions were, yes, sir.

Q. Were any of them held at the bank? A. Yes, sir.

Q. What was the earliest discussion that you now recall concerning checks? A. Well, I couldn't say just when, only I decided that it was easier to destroy the checks than it was to make the invalid deposit.

Q. Did you have any conversation with him along that line? A. Yes. We talked about it.

Q. Now, as nearly as you can recall what did you say and what did he say?

Mr. Carr: I am going to object again, your Honor, the same objection. This is purporting to show, I assume, similar offenses and I object on the ground that they are not similar offenses. That testimony is prejudicial to this defendant and does not involve the charges in the indictment.

Mr. Bell: One of the charges in the indictment is that he willfully and unlawfully and knowingly wrote these checks and that there was no mistake about it.

The Court: Objection is overruled."

Each of the twelve counts in the Indictment charges a separate and distinct offense—namely, that of issuing a check on a named date on a non-existent sugar ration account. The gist of the offense charged was the issuance of a sugar ration check knowing that no account existed in the name on which the check was drawn. The fact that the first seven counts charged a violation of Section 80 of Title 18, U. S. C. A., and the remaining five counts a violation of Section 2.6 of General Ration Order No. 8 is of no importance in so far as the question of intent is concerned. In all of the counts of the Indictment, it was necessary for the Government to prove a specific willful intent on the part of Appellant to issue checks on an account which did not exist. At no time during the case did Appellant contend that he did not issue and sign each and every one of the checks set forth in each count of the Indictment. As a matter of fact, Appellant raised no objection to the admission of the checks alleged in the Indictment except on the ground of the failure of the first seven counts to state an offense under

Section 80. On the contrary, Appellant cooperated with the Government and permitted the introduction in evidence of such checks without requiring that counsel lay the foundation usually required. [R. 33, 41, 52.]

Each of the counts in said indictment relates to a different transaction, making a total of twelve different checks and twelve different occasions.

As the Record reveals, the testimony elicited from Mr. Peterson was offered and introduced over the strenuous objection of Appellant in order to show Appellant's willful intent at the time of the commission of the specified acts in issue. The basis for the reception of this collateral and highly prejudicial evidence appeared to be that these conversations between Mr. Peterson and the accused constituted similar offenses which were admissible to prove the intent of the accused with respect to the charges in the indictment.

The fundamental rule of criminal law is that guilt of another offense cannot generally be proved to show guilt of the offense charged in the indictment. Appellant recognizes also the rule that evidence of similar offenses may be admitted in some cases for the purpose of showing intent.

Appellant contends, however, that there must be similarity in the offenses sought to be introduced under these circumstances with the specific offense before the trial court. There is an ever-present danger that such evidence of collateral matter will tend to draw the attention of the jury away from the consideration of the real issues of the trial and, as the 8th Circuit Court in *Paris v. United States*, 260 Fed. 529, 531, said, "to fasten it upon other questions, and to lead them unconsciously to

render their verdicts in accordance with their views on false issues rather than on the true issues on trial." It is respectfully submitted that this testimony does not fall within the exception to the general rule, inasmuch as the testimony of Mr. Peterson had no conceivable relationship to the element of intent alleged in the specific charges of the indictment.

The foundation of the rule which allows in evidence collateral proof of similar offenses to show intent, is that if a man does an act with a given intent, it is more or less likely that when he does a similar act, he does it with a similar intent. There are many acts such as passing counterfeit money or uttering forged documents which are the less likely to be innocent the more often they are repeated. In various circumstances, therefore, evidence of earlier acts may be admitted as tending to show a man's state of mind at the time he commits a later fraud. The mere fact, however, that intent is an issue is not enough to let in evidence of similar acts unless they are so connected with the offenses charged in point of time and circumstances *as to throw light upon the intent*. Such offer of proof of similar offenses endeavors only to eliminate any innocent explanation of the offense charged by showing that at some other time a like act has been done under similar circumstances. The full effect of such proof goes only to show that the oftener a like act has been done, the less probable it is that it could have been done innocently.

Wigmore states the rule in this manner in Vol. II, 3d Ed., Sec. 302, p. 200:

"The argument is based purely on the doctrine of chances, and it is the mere repetition of instances,

and not their system or scheme, that satisfies our logical demand.

“Yet, in order to satisfy this demand, it is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance. Suppose the blowing up of an American warship in Havana Harbor to be in question; the blowing up of various ships of various other nations in the preceding fifty years would have no significance as to the accidental nature of the occurrence (except to show that such an accident is possible); the blowing up of an American warship in the preceding year in Algiers would have scarcely more significance; but the blowing up of an American warship in the same year in Cadiz or in the same harbor of Havana would have striking significance. So, where the intent of an erroneous addition in a bookkeeper’s accounts is in issue, the erroneous addition of a bill rendered to a former employer ten years before would have no significance, because it is still within the limits of ordinary casual error that such things should occur at intervals; but several other erroneous additions in the bookkeeper’s own favor in the same year and the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation. In short, there must be a similarity in the various instances in order to give them probative value,—as indeed the general logical canon requires.”

In short, there must be a distinct similarity of the collateral offenses with the crimes charged in the indictment to justify the introduction of such collateral evidence to prove fraudulent intent. To allow the prosecu-

tion to invoke this rule as justification for its introduction of the testimony of Fred Peterson, is to stretch the rule beyond all reasonable bounds.

The substance of Mr. Peterson's testimony throws no light whatsoever on the issue of Appellant's intent at the time he committed the various acts charged to him in the indictment, nor does such testimony give any indication that Appellant contemplated doing the alleged acts charged in the indictment. This testimony served no other purpose but to bring into sharp focus a collateral, independent offense, the effect of which was to create in the minds of the jurors a presumption of guilt rather than of innocence of the Appellant to the specific offenses charged in the indictment.

Clearly, the enormity of the wrong to Appellant by admission of this damaging testimony is apparent. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit in *Fish v. United States* (1st Cir.), 215 Fed. 544, 549, warns the zealous prosecutor of the perils of such proof:

"Evidence of this character necessitates the trial of matters collateral to the main issue, *is exceedingly prejudicial, is subject to be misused and should be received, if at all, only in a plain case.*" (Emphasis supplied.)

Evidence of a fact which goes to prove a substantive distinct offense other than that for which the Defendant is accused, as does the testimony of Mr. Peterson, is mere propensity evidence, and such evidence is excluded under any form of the rule, for evidence is irrelevant if its only probative force and value is to show disposition to commit the crime or crimes charged.

Said the Court in *State v. Lyle*, 118 S. E. 803, 807:

“Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. *Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.*” (Emphasis supplied.)

To put it another way Appellant's contention that the District Court erred in admitting the testimony of Fred Peterson concerning alleged arrangements he made with Appellant to destroy checks, attention is directed to the following quotation from the article, EXCLUSION OF SIMILAR FACT EVIDENCE: AMERICAN, 51 Harvard Law Review 988, 1007:

“The mental process behind this is rarely explicit, but it may be stated somewhat as follows: ‘An exception to the general rule of exclusion is where the

other offenses are put in "to show intent." Here the prosecution offers to put in such evidence to show intent. Hence the evidence is admissible.' Obviously what has happened here is that the meaning of 'to show intent' has changed from 'relevant to show intent' to 'for the purpose of showing intent.' A slight variation of this is where the exception is stated as being 'on the issue of intent.' Then the mental process would be: 'There is here an issue of intent. Therefore other offenses are admissible.' These wanderings from the basic principles of the law are made possible by the spurious form of the rule, and they result in the admission of evidence of similar offenses which is not even *relevant* to one of the excepted categories of issues. All that such evidence is then relevant to, is the evil disposition of the accused and, behold, the bottom has dropped entirely out of this branch of the law."

If the testimony of the witness Peterson was believed by the jury, then obviously it tended to prove the existence of a conspiracy between the witness and Appellant to violate various provisions of various ration orders promulgated by the O.P.A.—more specifically those provisions relating to ration banking. The testimony did not tend to establish specific willful intent to issue the checks in question upon an account not in existence. It thus results that the testimony of Peterson tended to prove the existence of an independent and different crime from the offenses charged in the Indictment, and such testimony was irrelevant upon any theory and particularly upon the premise that it proved intent. Furthermore, there can be no question but that the testimony of Peterson was highly prejudicial and operated to the detriment of the Appellant.

SPECIFICATION OF ERROR IV.

The District Court Erred in Instructing the Jury That the Sugar Ration Checks Involved in the First Seven Counts of the Indictment Were Bills or Claims Under Section 80, Title 18, U. S. C. A.

The District Court instructed the jury as follows:

“The court instructs you that a sugar ration check of the type involved in the first seven accounts of the indictment is a bill or claim under the law under which these counts are drawn.” [R. 162.]

It is at once apparent that the objection to this instruction raises the same point heretofore made in challenging the sufficiency of the first seven counts of the Indictment both by way of the Motion to Dismiss and by the Motion for Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure. For that reason the argument heretofore advanced is applicable and is here adopted without repeating it at this place.

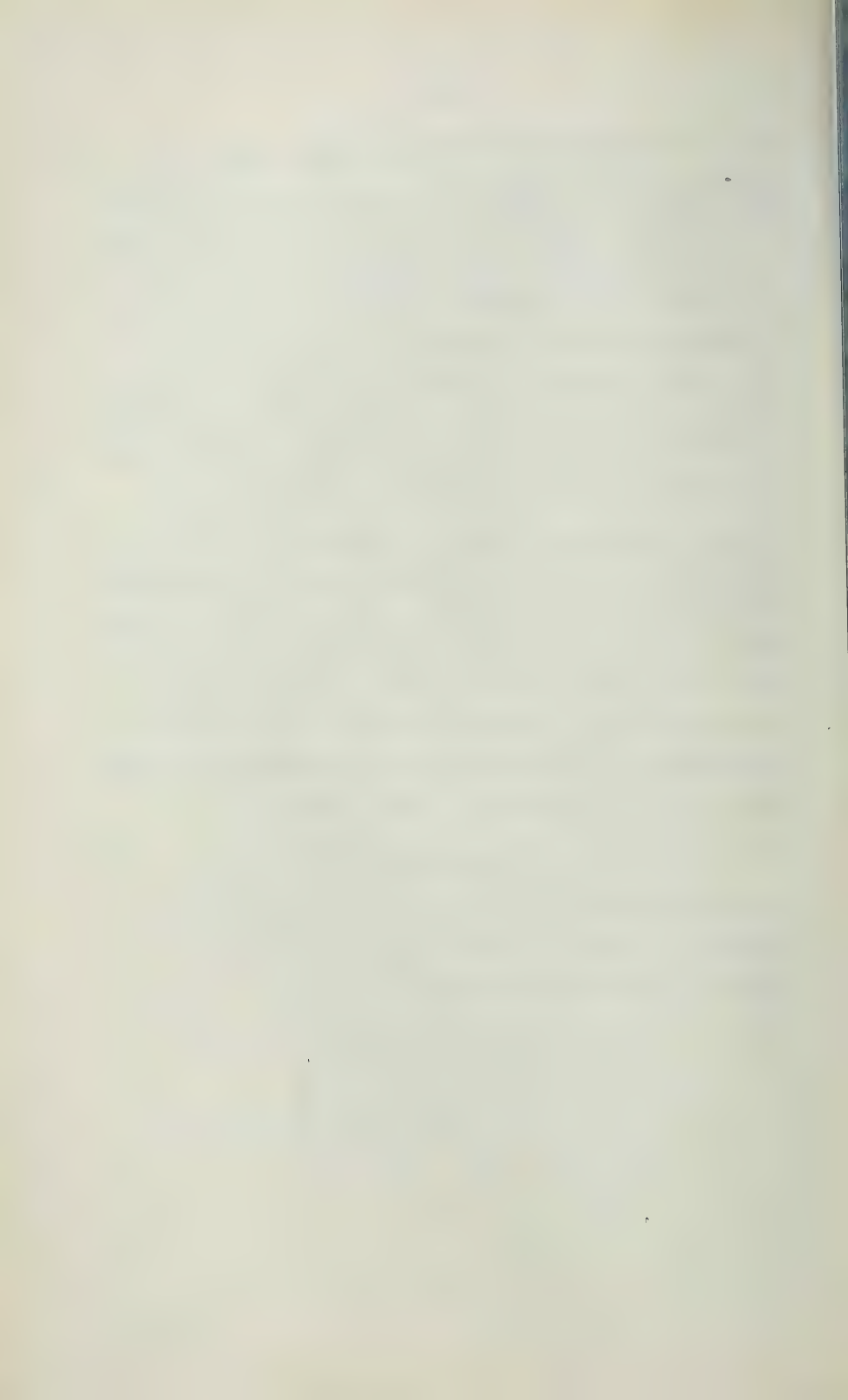
Conclusion.

It is respectfully urged that the matters presented herein warrant this court in setting aside the conviction of Appellant on each and every count.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.





APPENDIX.

Second War Powers Act.

50 U. S. C. A., App. Sec. 633(2).

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both."

Section 80, Title 18, U. S. C. A.:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall

knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

Sec. 2.6, General Ration Order No. 8:

"Acquisition, use, transfer or possession of ration document. No person shall acquire, use, permit the use of, transfer, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order."

No. 11753
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as JAMES M. FLY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S OPENING BRIEF.

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No. 11753

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as JAMES M. FLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF.

Jurisdictional Statement.

- A. The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter.
- B. This Court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225(a) and (d), which treat of the jurisdiction of courts of appeal.
- C. The crimes pleaded in the indictment are of two classes:
 - First: Counts I to VII, both inclusive, charge separate violations of Title 18, United States Code, Section 80.
 - Second: Counts VIII to XII, both inclusive, charge separate violations of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Sec. 633, *et seq.*), the Second War Powers Act of 1942, and General Ration Order No. 8.

Statutes and Regulations Involved.

The statutes and regulations involved in this case are set forth in the appendix to Appellant's Opening Brief as supplemented by the appendix attached hereto.

Statement of the Case.

On May 14, 1947, a twelve count indictment was filed in the United States District Court, for the Southern District of California, Central Division, against appellant [R. 2-10].¹

Felony Counts.

Counts One to Seven, both inclusive, are the felony counts. Each charges that appellant, on the respective dates identified, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate (*i. e.*, a sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America and bearing the signature, as maker, of appellant on behalf of the Italian American Import Co.), knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government (*i. e.*, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3, promulgated by said agency pursuant to law), in that, at said time and place, there was no sugar ration account in the name of appellant, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America [R. 2-6].

¹The references proceeded by "R" are to the record on appeal and those proceeded by "A. B." are to appellant's brief.

Misdemeanor Counts.

Counts Eight to Twelve, both inclusive, are the misdemeanor counts. Each charges that appellant wilfully used and transferred ration documents (*i. e.*, sugar ration checks drawn on Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of appellant on behalf of the Italian American Import Co., purporting to transfer sugar) to Smart and Final Co., in exchange for sugar in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of appellant or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America [R. 7-10].

On June 23, 1947, motion of defendant to dismiss the indictment was denied and defendant entered plea of not guilty to each of the twelve counts of the indictment [R. 11].

From September 23, 1947 to September 25, 1947, appellant was tried before the Honorable Leon R. Yankwich, and a Jury [R. 24, 12]. At the conclusion of the Government's case in chief, the trial judge denied [R. 146] appellant's motion for judgment of acquittal [R. 130]. On September 30, 1947, appellant renewed his motion for judgment of acquittal [R. 14-15] which was denied October 3, 1947 [R. 15].

The Jury found appellant guilty on each of the twelve counts of the indictment [R. 13].

Thereafter the Court sentenced the appellant to imprisonment for one year on each of the first seven counts of the indictment, the sentences to run concurrently; imprisonment for one year on count eight of the indictment,

the sentence to run consecutively with sentences imposed on counts one to seven inclusive; and fined appellant ten thousand dollars (\$10,000) on count nine; five thousand dollars (\$5,000) on count ten; five thousand dollars (\$5,000) on count eleven and five thousand dollars (\$5,000) on count twelve (making a total of twenty-five thousand dollars (\$25,000) in fines) [R. 16-18].

Statement of Facts.

PRELIMINARY.

The "Summary of the Facts" set forth in appellant's brief (A. B. 5-7), as well as other references in that brief to evidence taken at the trial, does not set forth the evidence most favorable to the Government, which alone will be considered on appeal.²

Appellant, James M. Mosca, also known as James M. Fly, prepared and signed a series of worthless sugar ration checks in amounts varying from 1,500 to 10,000 pounds of sugar [R. 28-32; 60-61; 67-68; Exhibits 1 to 12]. These checks were drawn on a non-existent sugar account of a non-existent company [R. 60], namely, the Italian American Import Company, and were signed by appellant on behalf of this mythical company [R. 28].

In some instances appellant procured the sugar himself by presenting the checks to such companies as Smart and Final Company [R. 28-29; 56-59].

²See *Hemphill v. United States*, 120 F. 2d 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627.

In other instances appellant wrote the checks and then sold them to other persons, or establishments needing sugar, at a certain price per pound [R. 40-41] which the purchaser had to pay appellant in addition to the price paid the supplier for the sugar.

Under another name, to wit, Italian American Delicatessen, appellant was registered with OPA [R. 68] and legally entitled to an inventory of sugar not to exceed 480 pounds [R. 109-110]. This sugar ration bank account of appellant, doing business as Italian American Delicatessen, was carried at the Santa Monica and Vermont Branch of the Bank of America [R. 63, 68, 84].

Appellant's worthless sugar ration checks signed by him on behalf of the non-existent "Italian American Import Co.," which was not registered with OPA [R. 68], had no sugar ration account with said Bank of America Branch Bank [R. 60], nevertheless, said worthless sugar ration checks were drawn on said Branch of said Bank.

Appellant negotiated the worthless checks by arrangement with one Fred Peterson, the Assistant Cashier and Chief Clerk of said Branch of said Bank, who removed said checks from the records of the Bank before the end of the month so that no record would exist by means of which the transaction could be traced [R. 115-124].

When Peterson left the bank, he was succeeded by one Gordon Smith who continued the operation of the scheme devised by appellant and Peterson after receiving instructions from Peterson as to the method of handling appellant's checks [R. 120-124].

Questions Presented.

Appellant's four "Specifications of Error" (A. B. 7), present only two issues, to wit:

First: Are the sugar ration checks involved in the first seven counts of the Indictment false bills, accounts, claims or certificates within the meaning of Section 80, Title 18, U. S. C. A.?

Second: Was it error to admit the testimony of the witness Fred Peterson, Assistant Cashier and Chief Clerk of the Bank on which the sugar ration checks were wrongfully drawn?

The foregoing "First" issue is determinative of appellant's Specifications I, II and IV. The above "Second" issue is appellant's Specification III.

We shall discuss appellant's Specifications as only two issues and in the order above indicated.

I.

Sugar Ration Checks Were "Bills" or "Claims" Within the Meaning of Section 80, Title 18 U. S. C. A.

The question may be put this way: is the language of Section 80 broad enough to comprehend the situation in the first seven counts of the Indictment in the instant case?

In so far as is pertinent to this issue, each of the first seven counts of the Indictment charges that:

"* * * [appellant] knowingly and willfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check * * * knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to * * * Ration Order * * *, in that, * * *, there was no sugar ration account in the name of [appellant] or the Italian American Import Co. in the Santa Monica and Vermont Branch of the Bank of America."

Analogy offers some basis for analysis. It is therefore pertinent to note that the following have been held to be within the purview of Section 80:

Falsity in Prescription for Narcotics.

U. S. v. Tommasello (C. C. A. N. Y. 1947), 160 F. 2d 348.

Falsity in application for Alien Identification Certificate.

U. S. v. Barra (C. C. A. N. Y. 1945), 149 F. 2d 489.

False Report as to amount of petroleum produced.

U. S. v. Gilliland (Texas 1941), 312 U. S. 86.

False Statements in Application for FHA Loan.

U. S. v. Mellon (C. C. A. N. Y. 1938), 96 F. 2d 462, cert. den. 304 U. S. 586.

False Invoice covering Sale of Used Tire under OPA.

U. S. v. Ganz, D. C. Mass. 1942, 48 Fed. Supp. 323.

False statement to secure Visa.

U. S. v. Goldsmith (C. C. A. N. Y. 1940), 108 F. 2d 917, cert. den. 309 U. S. 678, reh. den. 310 U. S. 657, and 313 U. S. 599.

The purpose behind this section is not only to protect the Government against false monetary claims but to protect the authorized functions of governmental departments and agencies from the perversion which might result from other deceptive practices.

U. S. v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598 (1941).

United States v. Ganz, 48 Fed. Supp. 323 (D. Mass. 1942), involved false invoices which were made and kept concerning the sales of tires, listing the sale price of used tires sold to certain persons at a price less than the actual sale price, and false records made and kept of such sales. An O. P. A. regulation required the keeping of such records for inspection by the O. P. A. Such invoices were held to be within the meaning of the statute, and the keeping of records of such sales by the O. P. A. to be a "matter within the jurisdiction of [a] department or agency of the United States."

Pecuniary loss to the Government is not essential to guilt under this statute.

U. S. v. J. Greenbaum and Sons, Inc., 123 F. 2d 770 (C. C. A. 2d 1941);

U. S. v. Goldsmith, 108 F. 2d 917 (C. C. A. 2d 1940), cert. den. 309 U. S. 678;

U. S. v. Presser, 99 F. 2d 819 (C. C. A. 2d 1939).

The force and effect of statutes of this kind, designed to prevent frauds upon the Government, may not be frittered away by a mere literal construction.

Spivey v. U. S., 109 F. 2d 181 (C. C. A. 5th 1940), cert. den. 310 U. S. 631.

In the *Spivey* case, above, a charge was brought under Section 80 based on cotton producer's notes which had been filled out for sums in excess of the amounts actually obtained by the farmers thereon, and in some instances the names of the makers of the notes would be forged, following which the defendant would take the notes to various banks and secure credit thereon. The banks, believing the notes were genuine, would assign them to the Commodity Credit Corporation. The defendant, on appeal, contended that such an instrument did not constitute "a bill" within the meaning of the statute. The Court said at page 184, "We cannot agree with appellant on any of these points." The Court further said on page 185:

"The third point made against the conviction and sentence under Section 80, that Count five and certain other counts in the indictment erroneously charge the use of a 'false bill,' whereas the instrument declared on in each of them, is not a bill at all, but something entirely different, is we think, wholly without merit. Each of the counts in question, fully and clearly de-

clares upon the instrument and by quoting it, shows what it in fact is, and if calling the cotton producer's note and loan agreement, declared on in each count, a 'false bill,' was to misname it, this was mere surplusage and did not at all affect the validity of the counts."

In *United States v. Zavala*, 139 Fed. 830 (C. C. A. 2d 1944), the defendant was indicted for knowingly making a false and fraudulent baggage declaration in violation of the provisions of Title 18, Section 80 of the United States Code Annotated, wherein he set forth he possessed \$850.00 in United States currency and no more, whereas he had brought into the country and had in his possession the further sum of \$19,500.00 in such currency which he had not mentioned in his declaration or otherwise. The Court said (page 831):

"We feel no doubt that Section 80 covers both the use of documents to defraud the government and also the use of any false statement, whether oral or written, as to any matter within the jurisdiction of any department or agency of the United States."

That the term "matter within the jurisdiction" of the United States, etc., should not be literally and technically construed is made plain by the same decision on page 832, where the Court said:

"It is also plain that the declaration and representation involved a 'matter within the jurisdiction' of the United States Treasury and its Customs Bureau, and, therefore, of a 'department or agency of the United States', within the meaning of Section 80 of Title 18."

The writing of sugar ration checks and the uttering and publishing thereof are matters within the jurisdiction of any agency of the United States.

Third Revised Ration Order 3 (11 F. R. 134; issued 12-29-45, effective 1-1-46).

Under the terms of Section 15.7(b) a ration check must bear the name of the account and the depositor's authorized signature. Under Section 15.7(d) thereof, no check may be issued for an amount larger than the balance of the account. Section 15.9(d) provides *inter alia*, "a depositor must keep . . . statements of accounts received by him, canceled checks returned to him and all stubs from which checks have been detached or other record used in place of stubs. All records shall be subject to inspection, removal or other disposition only by the Department of Justice, the Office of Price Administration or any other persons authorized by the Office of Price Administration."

Banks participating in the ration banking system are agencies of the Office of Price Administration.

General Ration Order No. 3, Section 1305.411(b) (8 F. R. 865; issued 1-4-43, effective 1-27-43).

The same principles of law apply to a ration check for sugar as apply to an ordinary check for money. In the latter case a check is a representation that there is an account and that the drawer is authorized to draw upon it.

The indictment follows the language of the statute, and the instrument described in the indictment as having been

falsely made, etc., by appellant is covered by this language. As has been pointed out, Section 80 has not been construed narrowly but has been liberally interpreted to prevent frauds of all kinds, whether monetary or not, and whether made in writing or not, which are the result of false or fraudulent statements or concealments.

In *United States v. Meyer*, 140 F. 2d 652 (C. C. A. 2d 1944), the defendant was given an opportunity, without compulsion, to appear and present evidence before the Exclusion Board. He appeared and in answer to questions stated that he had once "and just once" met a certain person about whom they asked him. This person had been convicted in December 1941 of conspiring to commit espionage against the United States. As a result of his statements, defendant was indicted on two counts of making a false and fraudulent statement in a matter "within the jurisdiction of [a] department or agency of the United States," in violation of Section 80. The Court rejects defendant's attempt to narrow the construction of the statute either as to the jurisdiction of the agency or as to the kind of statements covered and held that the section is broad enough to cover the statements made by the defendant.

That a broad interpretation should be given to the statute in so far as the agency to which the statements, claims, bills, etc., are made or presented and as to the type of statements and conduct covered by the section, is made clear by *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943); reh. den. 318 U. S. 799.

II.

**The Testimony of Fred Peterson Was Properly
Admitted.**

It was not error to admit the testimony of Fred Peterson, Assistant Cashier and Chief Clerk of Santa Monica and Vermont Branch of the Bank of America [R. 112-113].

Appellant could not have committed the crimes of which he has been convicted had it not been for the co-operation of the witness Peterson and his successor Smith in their strategic position in the bank. The revelation of the arrangement, its establishment or creation and the acts done pursuant thereto were pertinent to the issue of intent.

The testimony of Peterson tended to show, if it did not demonstrate, that throughout the calendar year 1946 [R. 117], Peterson and his successor, Smith [R. 120-123] at the instance and request of appellant [R. 121] who paid them a consideration therefor (1 penny a pound) either wrongfully and feloniously made false entries by crediting appellant's sugar ration point account to cover appellant's overdrafts thereon or, if more convenient to Peterson and Smith, destroyed appellant's overdrafts.

The relationship between appellant and Peterson was the *sine qua non* to appellant's commission of the crimes of which appellant has been convicted in this case.

The testimony of Peterson was admitted subject to a motion to strike if it were not connected up [R. 115]. At the conclusion of the testimony of the witness Peterson appellant made no motion to strike. Even if such motion had been made, it would have been properly denied

because the evidence showed a continuing course of conduct between appellant and the witness throughout the calendar year 1946 pertinent to both the specific acts in issue and concomitant intent of appellant.

Supplementing the selected excerpts of testimony of witness Peterson printed in the opening brief of appellant, the following additional portion thereof is essential to proper perspective:

“A. Well, it was just that he asked me if I would credit his account with these invalid deposits.

Q. What did you say? A. I agreed to and I did.

Q. And you did so? A. Yes, sir.

Q. Now, on about how many occasions can you recall having done that—gone through that process of entering deposits to his credit? [128] A. There were several.

Q. Was there any break or secession in that conduct or did it continue rather generally and regularly throughout the rest of the year? A. Yes, it did.

Q. Well, what did—what is your answer?

The Witness: It continued throughout the year.”
[R. 117.]

* * * * *

“Q. By Mr. Bell: As near as you recall now try to think back and recall just what Mr. Fly said to you and what you said to Mr. Fly. [130] A. In regard to these checks?

Q. Yes. You said that you had told him you were going to destroy the checks? A. Yes.

Q. Rather than make deposits? A. Yes.

Q. Fictitious deposits. Now, what did you say and what did he say? A. Well, as near as I can remember—

Q. Keep your voice up. A. As near as I can remember I just told him that I would destroy the checks. He asked me if I would and I told him yes and that was about the size of the conversation.

Q. Well, was anything further said at these other conversations? A. Oh, it was all the same thing. It was always about the checks.

Q. I am asking you, Mr. Peterson, to try to remember as nearly as possible, in all fairness to Mr. Fly so that you will quote him as nearly as you can, I am asking you to search your memory now and try to say just what he said and just what you said if you can possibly recall it? [131] A. Well, that I can't do. He asked me to take care of them and I said that I would.

Q. And did these conversations cease sometime in 1946 or did they continue up until the latter part of 1946? A. They continued right up until the latter part of 1946.

Q. You are no longer with the bank, are you? A. No, sir.

Q. When did you leave the bank? A. September 30th, 1946.

Q. Did you have any conversation with Mr. Fly concerning your leaving the bank? A. Yes, sir.

Q. Where did that conversation occur? A. I couldn't say the exact place.

Q. Well, was it at his place of business, at the bank, or where? A. Probably at his place of business.

Q. Was anyone else present? A. No, sir.

Q. Now again think back and try to recall as nearly as you can what you said to him and what he said to you.

Mr. Carr: Objected to on the ground it is wholly immaterial.

The Court: I can't tell you from the way the question is asked whether it is material or not. [132]

Mr. Carr: But, your Honor, the answer comes out and then it is like the old saying—you don't like for me to say it, I know, but if you will pardon me, it is like, you know, ringing the bell once. The harm is done.

The Court: Well, I will reserve a motion to strike. You may answer the question.

The Witness: Where were we now?

The Court: He is asking for the conversation at the time you were leaving the bank or when you were about to leave the bank.

The Witness: I told Mr. Fly that I had prepared my resignation and intended to put it in and that he shouldn't write any more checks. And at a later date he contacted me and told me that he had written more checks and asked me to go back to the bank.

Q. By Mr. Bell: When was this? A. That was about the middle of October.

Q. Where did you hold the conversation? A. That particular conversation, I remember, was at Tom Brenneman's Restaurant over dinner.

Q. Was anyone else present? A. No.

Q. Now, relate, if you can, the entire conversation. A. Well, I told him that I wouldn't go back to work at the bank and he said, 'Well, we will have to do something,' [133] and it was then that it was suggested—

Q. Who suggested it? A. Mr. Fly suggested that I see Mr. Smith.

Q. Who was Mr. Smith? A. He was employed at the bank at that time.

Q. Was that the Mr. Smith who succeeded you? A. Yes, sir.

Q. All right, go ahead and tell the rest of the conversation. A. I approached Mr. Smith.

Q. Well, going back to the conversation, have you related all of it that you can recall? A. Well, as I recall it, that was about all there was. I told him I would see Mr. Smith, which I did.

Q. Well, is your memory exhausted as to anything further that was said at that time? A. Well, he said he would pay Mr. Smith one cent a pound for these checks.

Q. Well, did he say anything further about what you should do? A. No, sir.

Q. Well, do you recall whether or not he asked you to tell Mr. Smith anything? A. Only that he told me to ask Smith if he would take care of it.
[134]

The Court: You cannot tell us what you told Smith. After you talked to Smith did you report back to Mr. Fly?

The Witness: Oh, yes, then I did.

The Court: To Mr. Fly?

The Witness: Yes, sir.

Q. By Mr. Bell: Did you contact Mr. Smith? A. Yes, sir.

Q. And did you report back to Mr. Fly? A. Yes, sir.

Q. And where did you see Mr. Fly? A. I don't recall the exact location.

Q. Well, about when did you see him? A. Well, it would have been the next day, the day after I talked to Mr. Smith.

Q. Did you have a conversation with him? A. Yes, sir.

Q. Relate the conversation as nearly as you can. A. I told him—

Mr. Carr: I assume, if I may interrupt, my objection will run to this line of testimony.

The Court: That is all right.

Mr. Carr: On the same ground, your Honor.

The Court: That is right.

Q. By Mr. Bell: Relate what he said to you and what you said to him as nearly as you can remember. [135] A. I told him I talked to Mr. Smith and Mr. Smith had agreed to destroy these checks as they came in.

Q. Do you recall whether anything further was said about the one cent a pound? A. No, only that he had said he would pay him one cent a pound. That was understood.

Q. Did you thereafter have any further dealings with Mr. Fly in connection with the sugar ration account at the bank? A. Yes, sir.

Q. What was the transactions that you had after that? A. Mr. Fly gave me money to give to Mr. Smith.

Q. When he gave you the money did he say anything to you? A. Just, 'Give this to Mr. Smith.' 'Smitty' we called him.

Q. About how many occasions did he give you some money to give to Mr. Smith? A. Several. I would not know.

Q. By 'several' can you recall whether it was five or six or seven times? A. Well, 10 or 15 times, 10 or 12.

Q. On each occasion can you recall how much he gave you to give to Mr. Smith? A. Always various amounts, \$75.00 or \$100.00 or \$125.00. [136] Small amounts like that.

Q. Mr. Peterson, will you describe to the jury a little more completely the manner in which you handled these accounts and as you described briefly, extract or destroy the checks. Will you describe what happened—how those checks were handled? A. Well, the checks came into the bank on a transmittal letter, possibly two or three times a month.

Q. When did they arrive at the bank—what time of day? A. In the early morning by messenger.

Q. In what form were they when they arrived? A. They were fastened around the transmittal letter with a rubber band.

Q. What time did you get to the bank? A. Usually around seven o'clock.

Q. Do you know what happened then to these ration bank accounts or checks? A. Yes, sir.

Q. Describe what happened physically? A. Well, they were placed in the vault and kept there until the end of the month.

Q. Did you place them there? A. Yes, sir.

Q. Did anyone else handle these accounts other than [137] you? A. No, sir.

Q. At the end of the month what happened? A. At the end of the month they were brought out along with all of the other accumulation of ration evidences that would come over the counter. They would be worked up and charged to the various accounts.

Q. And when you came to check those ration checks did you see any checks made out by the Italian-American Import Company? A. Yes, sir.

Q. And signed by James M. Fly? A. Yes, sir.

Q. When you came to those checks what did you do with them? A. I pulled those out and destroyed them.

Q. Have you been prosecuted for your part in that transaction? A. Yes, sir.

Q. Have you been sentenced? A. Yes, sir.

Mr. Bell: That is all.

Cross-Examination

By Mr. Carr:

Q. When was the last time you saw Mr. Fly, Mr. [138] Peterson? A. Day before yesterday.

Q. Where did you go to see Mr. Fly on that occasion? A. I just stopped to talk to him.

Q. How much did you ask him for? A. I asked him for \$100.00.

Q. Mr. Fly doesn't owe you any money at this time, does he? A. He has promised to pay my fine.

Q. Promised to pay your fine? A. Yes, sir.

Q. When was that? A. Well, right after my—right after I was sentenced.

Q. Why don't you have money to pay your own fine? A. No, sir.

Q. Why don't you have? A. (No answer.)

Q. When you left town you had \$6,000 in the bank, didn't you? A. Yes, sir.

Q. Where is the \$6,000? A. Most of it I repaid to my brother-in-law.

Q. To your brother-in-law? A. Yes, sir. [139]

Q. When did you leave town? A. About the latter part of November or first of December.

Q. Was that at the time the news came up that something might happen? A. Yes, sir. Mr. Fly told me that he was being investigated.

Q. And you got out of town? A. Yes, sir.

Q. Where were you picked up by the marshal? A. At Las Vegas.

Q. And you were brought to Los Angeles? A. Yes, sir.

Q. And were you put in jail? A. Not here in Los Angeles.

Q. How did you get out? On bail? A. Yes, sir.

Q. Who made your bail? A. Mr. Fly.

Q. He paid for your bail, did he? A. Yes, sir.

Q. Did you ask him to pay for your bail? A. Yes, sir.

Q. You and Mr. Fly had been friends for some time? A. Yes, sir. [140]

Q. And how many times have you talked with Mr. Taylor here after you got back to Los Angeles? A. I didn't talk to Mr. Taylor after I got back to Los Angeles.

Q. What agents did you talk to? A. I didn't talk to any agent.

Q. You talked to Mr. Bell? A. I talked to Mr. Bell just before I came up here the other day.

Q. Well, you entered a plea, didn't you, in some other court? A. Yes, Judge Mathes.

Q. And I believe you got a fine? A. Yes, sir.

Q. You, of course, were not promised anything by anyone, were you? A. No, sir.

Q. Was there any implication you would not be called as a witness? A. No, sir; my attorney told me he didn't think that I would be called as a witness but that was the only assurance.

Q. You were not in jail; you are out and free, aren't you? A. Yes, sir.

Q. And all you have now is a fine to pay? [141]
A. Yes, sir.

Q. Incidentally, how many people were you tearing checks up for? A. Mr. Fly is the only one.

Q. Was that the only one? A. Yes, sir; I covered an overdraft for one other party.

Q. And, of course, you got nothing out of these things yourself? A. Well, I wouldn't say that.

Q. What? A. No, I got something out of it.

Q. When did you decide to leave town, by the way? A. Shortly—just right before I left.

Q. It was a rather sudden decision, I take it, isn't that right? A. Yes, sir.

Q. And where were you at the time—I believe you said they found you in Arizona? A. Yes, in Nevada.

Q. Now, isn't it a fact that you called Mr. Fly several times and asked him for money recently? A. Yes, sir.

Mr. Carr: That is all. [142]

Redirect Examination

By Mr. Bell:

Q. When you left town did Mr. Fly say anything about your leaving town? A. Yes, sir.

Q. What did he say? A. Well, he advised me to leave town.

Mr. Carr: I move to strike that answer. I object to the word 'advise.'

The Court: I will strike out the word 'advised.'

Q. By Mr. Bell: Where and when did the conversation occur? A. It was on the telephone.

Q. You have talked to him on the phone before?
A. Yes, sir.

Q. And you are able to recognize his voice? A. Yes, sir.

Q. What was the conversation? A. Well, he told me that he was being investigated and he thought it would be a good idea if I would leave town. I was planning to leave anyway to go back to Nebraska.

Q. But that was his statement as nearly as you can recall it? A. Yes, sir.

Mr. Bell: That is all. [143]

Recross-Examination

By Mr. Carr:

Q. How long had you worked in the bank, by the way? A. Seven years in the Bank of America.

Q. What was your occupation previous to that time? A. Ten years with the Federal Reserve Bank.

Q. And how old are you, sir? A. 33." [R. 119-128.]

Conclusion.

No reversible error was committed by the trial court. Appellant had a full and fair trial. The verdict is fully supported by the evidence. The sentence and the fine were moderate and clearly justified. The Judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

Some additional pertinent provisions of General Ration Order Number 8 are:

“§2.9 *Transfer in exchange for invalid or improperly acquired ration document.* No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it.”

Third Revised Ration Order No. 3 (11 F. R. 134), provides in part as follows:

“ARTICLE XV—RATION BANKING

Sec. 15.1. *How accounts are authorized.* Revised General Ration Order 5 and this order require certain persons and permit others to have ration bank accounts. Only these persons may become depositors and they may open only the accounts specifically authorized by or under Revised General Ration Order 5 and this order.

Sec. 15.2. *Separate depositor as to each account.* Each person who opens more than one account is deemed to be a separate depositor as to each of his accounts. (Thus, if one person has two establishments and opens a separate sugar account for each, he is a sugar depositor as to each account.)

Sec. 15.3. *How many accounts permitted.* Not more than one account for any one establishment may be opened for sugar unless authorized by the Office of Price Administration.

Sec. 15.4. *Accounts opened where dollar accounts carried.* Every account opened for any establishment must be opened at a bank carrying a dollar checking account for that establishment, unless otherwise authorized by the Office of Price Administration. . . .

Sec. 15.5. *Signature cards and other papers required.* A person shall open his first account by signing and delivering to the bank completed signature cards supplied by the bank. He may open any additional account in the same bank by furnishing such additional signature cards as the bank may request. He may change the authorized signatures for an existing account by signed notice to the bank, and by furnishing such signature cards as the bank may request. He shall also, in all cases, furnish such references, proofs of identity and documents showing his authority to execute the signature cards as the bank may request.

Sec. 15.6. *Deposits (a) What to be deposited.* A depositor shall deposit all evidences which are in his possession when he opens his account, or are thereafter accepted by him, in the account carried for the establishment by or for which the evidences were received, and may not transfer them to any person for any purpose, unless otherwise provided by the Office of Price Administration. However, he shall not deposit in his account any evidence which has not yet become valid or which no longer is valid for deposit.

(b) *How deposits are made.* All ration evidences presented for deposit must be in the form prescribed by Revised General Ration Order 5 or this order and accompanied by a deposit slip filled out in duplicate, in the form prescribed by the Office of Price Admin-

istration indicating each item deposited by type and amount, and in the case of a check, by transit number, unless permission to omit the transit number is granted by the Office of Price Administration. All evidences must be endorsed by the depositor before being deposited.

.

(d) *Person who fails to open a required account shall not transfer evidences.* A person who is required to open an account but does not do so may not transfer ration evidences to any person for any purpose.

Sec. 15.7. *Issuance and use of checks* (a) *When check to be issued.* A check may be issued only by a depositor and only for a purpose permitted and with the effect prescribed by Revised General Ration Order 5 or this order authorizing the account on which the check is drawn.

.

Sec. 15.8(d)(b). *How checks are issued.* Each check and its stub must be completely filled out before the check may be issued, but a check register, duplicate voucher or any similar record may be used in place of the check stub. Both check and stub or other record must contain the name of the person to whom the check is to be issued, the date on which it is drawn and the amount of credits to be transferred. The check must bear the name of the account and the depositor's authorized signature or signatures.

(c) *Post-dated checks prohibited.* No person may issue or transfer a check before the date it bears.

(d) *Overdrafts prohibited.* No check may be issued for an amount larger than the balance in the ac-

count on which it is drawn less the amount of outstanding checks drawn on that account. . . .

Sec. 22.10. *Unlawful use or possession.* No person shall at any time either use or have in possession or under his control or take delivery of any sugar, checks, coupons, stamps or ration books, where such possession, control, or acquisition is in violation of this order.

Sec. 22.13(b) . . . unless expressly permitted by this order or otherwise authorized by the Office of Price Administration, no person may surrender evidences except to authorize a delivery of sugar.

ARTICLE XXV—DEFINITIONS.

Sec. 25.1. *Meaning of terms used in this order.*
. . . (a) Whenever the provisions of this order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, right and privileges shall be considered as being conferred or imposed upon the person owning such establishment or registering unit with respect thereto.

DEFINITIONS.

(1) 'Account' means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits.

(5) 'Check' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

(9) 'Depositor' means a person who has a ration bank account. A person shall be deemed a separate depositor with respect to each of his accounts.

(15) 'Issue' when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.

(19) 'Ration evidences' or 'evidences' means checks, coupons, and stamps.

11 F. R. 134, 11699."

No. 11756

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ALASKA WORLD WAR II VETERANS'
BOARD and ROBERT ELLIS, JOHN S.
HELLENTHAL, JOHN M. CROSS, L. EM-
BERT DEMMERT, and PAUL SOLKA, Jr.,
members of said Board, and NORMAN
HALEY, executive officer of said Board,
Appellants,

vs.

TERRITORY OF ALASKA, ex rel
OSCAR G. OLSON,
Appellee.

Transcript of Record

Upon Appeal from the District Court, Territory of Alaska,
Division Number One

NOV 4 1947

PAUL P. O'BRIEN

No. 11756

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ALASKA WORLD WAR II VETERANS'
BOARD and ROBERT ELLIS, JOHN S.
HELLENTHAL, JOHN M. CROSS, L. EM-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

FAULKNER AND BANFIELD,
Juneau, Alaska.

For Appellants.

RALPH J. RIVERS,
Territorial Attorney General,
Juneau, Alaska.

For Appellees.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 5753-A

TERRITORY OF ALASKA, ex rel
OSCAR G. OLSON,

Plaintiff,

vs.

THE ALASKA WORLD WAR II VETERANS'
BOARD and ROBERT E. ELLIS, JOHN S.
HELLENTHAL, JOHN M. CROSS, L. EM-
BERT DEMMERT, and PAUL SOLKA, Jr.,
members of said Board, and NORMAN
HALEY, executive officer of said Board,
Defendants.

COMPLAINT AND PETITION FOR WRIT
OF MANDAMUS

To the Honorable George W. Folta, Judge of the
Above Entitled Court:

The plaintiff, Oscar G. Olson, respectfully repre-
sents to this court:

1. That he is the duly elected, qualified and act-
ing Treasurer of the Territory of Alaska.
2. That the defendant, The Alaska World War
II Veterans' Board, hereinafter referred to
as the Board, is a board organized and created
by and under the provisions of Chapter 27,
Session Laws of Alaska, 1946.
3. That the defendants, Robert E. Ellis, John S.
Hellenthal, John M. Cross, L. Embert Dem-

mert and Paul Solka Jr., are the duly appointed and acting members of said Board; that the defendant, Norman Haley, is the duly appointed and acting executive officer of said Board, with the title "Commissioner of Veterans' Affairs."

4. That Section 5 of said Chapter 27, Session Laws of Alaska, 1946, provides for an appropriation of \$350,000.00 to be paid to the Board and to be repaid to the Territorial general treasury "as soon as revenues collected through the tax imposed by this act will permit, but not later than four years after the effective date hereof." That the tax referred to is the gross sales and services tax imposed by Section 3 of said Act. That said \$350,000.00 was thereupon transferred to the World [1*] War II Veterans' Fund under the jurisdiction of said Board, as provided by said Act.
5. That since said effective date, to wit, the third day of April, 1946, revenues collected by said tax exceed one and three-quarter million dollars, including \$304,000 collected for the quarter ending June 30, 1947; that revenues anticipated from said tax for the quarter ending September 30, 1947, and payable during October, 1947, will equal approximately \$300,000; that revenues collected through said tax now permit repayment by said Board to the general treasury.

* Page numbering appearing at foot of page of original certified Transcript of Record.

6. That demand has been made upon the Board to repay to the territorial treasury said loan on an installment basis as follows: One-half thereof on July 3, 1947, being the amount of \$175,000, and the balance on October 31, 1947; that said Board has refused to comply with said demand.
7. That a serious financial shortage exists with regard to the general fund of the territorial treasury, and that the aforesaid refusal on the part of said Board is arbitrary and unreasonable and amounts to an abuse of authority contrary to law, which greatly hampers carrying out of general territorial functions.
8. That plaintiff has no plain, speedy and adequate remedy in the due course of law to compel said Board to perform its duty of making repayment to the general treasury as aforesaid.

Wherefore, plaintiff prays that an Order be granted by this Court for the issuance of an Alternative Writ of Mandamus commanding and directing the defendants, the Board and said members and Norman Haley, Commissioner of Veterans' Affairs, to repay said money to the territorial treasury through issuance of appropriate vouchers executed by said Commissioner, one of said vouchers in the sum of \$175,000 to be issued forthwith and the other in the same amount to be issued on October 31, 1947, or, failing to pay said first installment forthwith, to appear before this Court upon

a day to be named in said Writ, and show cause, if any there be, why they have not done so and why a peremptory writ of mandamus should not be issued requiring them to repay as aforesaid.

RALPH J. RIVERS,

Attorney General for Alaska.

FRANK L. OLIVER,

Assistant Attorney General for Alaska.

Attorneys for Plaintiff. [2]

United States of America,
Territory of Alaska—ss.

Oscar G. Olson, being first duly sworn, on oath deposes and says: That he is the plaintiff above named and that he is the duly elected, qualified and acting Treasurer for the Territory of Alaska; that he has read the foregoing Complaint and Petition for Writ of Mandamus and knows the contents thereof, and believes the same to be true.

OSCAR G. OLSON.

Subscribed and sworn to before me this 18th day of August, 1947.

[Seal]

FRANCES G. REGAN,

Notary Public for Alaska.

My commission expires March 21, 1948.

[Endorsed]: Filed Aug. 18, 1947. [3]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS TO PLAINTIFF'S COMPLAINT AND PETITION FOR WRIT OF MANDAMUS AND TO THE ALTERNATIVE WRIT OF MANDAMUS

Come now the defendants above named and in answer to plaintiff's Complaint and Petition for Writ of Mandamus and in answer to the writ, admit, deny and allege as follows:

I.

Defendants admit the allegations contained in paragraph 1 of the Complaint and Petition.

II.

Defendants admit the allegations contained in paragraph 2.

III.

Defendants admit the allegations contained in paragraph 3.

IV.

Defendants admit the allegations contained in paragraph 4.

V.

Referring to the allegations contained in paragraph 5 the defendants deny that the revenues collected through the Veterans' tax to date now permit repayment of the sum of \$350,000 by the Board to the general treasury, which was advanced

to the Board pursuant to the provisions of Section 5 of Chapter 27 of the Session Laws of Alaska, 1946; deny that the revenues collected now permit the repayment by the Board to the general treasury of any portion of the sum of \$350,000.00 and defendants admit each and every other allegation contained in paragraph 5.

VI.

Defendants admit the allegations contained in paragraph 6.

VII.

Defendants deny the allegations contained in in paragraph 7. [4]

VIII.

Defendants admit the allegations contained in paragraph 8.

Affirmative Defense

For the further and affirmative defensive to plaintiff's Complaint and Petition for Writ of Mandamus and to the Alternative Writ of Mandamus defendants allege as follows:

I.

That at the 1946 special session of the Alaska Legislature there was passed an act known and designated as the Alaska World War II Veterans' Act and contained in Chapter 27 of the published session laws of Alaska, 1946 and which act was approved on April 3rd or 4th, 1946.

II.

That the purpose of the act is declared in the second section thereof to be to "partially discharge the obligations of the Territory of Alaska to those of its citizens who are serving or have served in the Army, Navy, Marine Corps or Coast Guard during World War II."

III.

That the act provides for the appointment of a board for the administration of the act which is known and designated as the Alaska World War II Veterans' Board and pursuant to the provisions of the act the Board was created and its members appointed pursuant to law, and they are the defendants Robert E. Ellis, John S. Hellenthal, John M. Cross, L. Embert Demmert and Paul Solka, Jr.

IV.

That the act also provides for the creation of the office of Commissioner of Veterans' Affairs and the defendant Norman Haley was appointed Commissioner of Veterans' Affairs and Executive Officer of the Board and is now and has been at all times mentioned herein the duly appointed and Acting Commissioner of Veterans' Affairs pursuant to the provisions of Chapter 27 of the Session Laws of Alaska, 1946.

V.

That the purpose of the act aforesaid was to pay bonuses and make loans to veterans of World War II as therein provided. [5]

VI.

That Section 7 of the act aforesaid provides that it shall take effect immediately upon its passage and approval, thereby setting up the Board and providing for the operation of the law immediately upon the passage and approval of the act.

VII.

That the act further provides for the creation of a fund through taxation known as a Veterans' Revolving Fund to carry out the purposes and provisions of the Act and to make payment of bonuses and to make loans to veterans and under the provisions of the act loans were to be made and bonuses paid immediately upon the passage and approval of the act.

VIII.

That the tax levied to carry out the purpose of the act went into effect on April 1, 1946 but the first taxes were payable during the month of July, 1946 and in order to provide funds for the immediate application of the provisions of the act to veterans the Legislature enacted Section 5 of the act which reads as follows:

“Section 5. Appropriation. There is hereby appropriated the sum of three hundred fifty thousand dollars (\$350,000.00) for deposit in the Alaska World War II Veterans' Revolving Fund to be used for the purpose of this Act, including expenses of administration; pro-

vided, however, that the Board shall pay back such sum to the Territorial Treasurer as soon as revenues collected through the tax imposed by this Act will permit, but not later than four years after the effective date hereof."

IX.

That the Alaska World War II Veterans' Act went into effect immediately upon its passage and approval and the Board was created and defendant Norman Haley was chosen Commissioner and ever since the date of the passage and approval of the act loans have been made and bonuses paid to veterans as hereinafter set forth.

X.

That there are in the Territory of Alaska eligible for benefits under the provisions of the Act, that is; qualified to receive loans and bonuses, between 6,500 and 7,000 veterans and many applications began to come into the Board as soon as its machinery was set up and the executive [6] officer and commissioner appointed.

XI.

That the total sum of \$1,851,012.35 has been paid in to the Veterans' Fund through taxes up to the date of the issuance of the Alternative Writ herein and branch offices of the Board have been set up as provided by the Act and pursuant to regulations of the Board at Juneau, Anchorage, Fairbanks and Ketchikan and that adding the taxes received as

hereinabove set forth, interest collected and the amount advanced by the Territory from the general fund, the total revenues coming into the hands of the Commissioner to the date of the filing of the complaint herein amount to \$2,227,232.01.

XII.

That the Board has expended \$4,937.34 in the purchase of equipment and it has advanced in loans and bonuses all of the remaining sums coming into the hands of the Commissioner from every source except the sum of \$388,795.38 which was on hand at the date of the issuance of the Writ herein and against which there are applications for bonuses and loans; or in other words the Board and the Commissioner have advanced to the date of the Writ herein, in loans and bonuses \$1,741,044.98 and the Board has also from the fund paid the administrative expenses and all other expenses authorized by the law so that the total sum remaining on hand at the date of the Writ herein was \$388,795.38 as herein above stated.

XIII.

That the Board has made 318 direct loans and 264 are active loans and it has paid 1,207 bonuses and that these loans and bonuses have been sufficient to care for only a little more than 25 per cent of the estimated number of veterans in the Territory who are eligible for loans and bonuses and the Commissioner has pending 937 unpaid applications for bonuses totaling \$348,740.00 and he has pending

applications for 308 loans, none of which have been advanced, and which total \$2,066,320.00 and in addition thereto the Commissioner has received 226 inquiries for bonuses without formal applications and 66 inquiries regarding loans where no formal applications have yet been made.

XIV.

That application has been made to the Board by the Board of Administration of the Territory of Alaska for repayment of the appropriation [7] which was advanced to the Board in April, 1946 in the sum of \$350,000.00 and the Board has declined to authorize repayment for the reason that on account of the small balance of the funds on hand and the large number of applications for loans and bonuses against that fund and in the light of the general purposes of the Act which is to make and guarantee loans and pay bonuses to veterans in partial discharge of the recognized and declared obligations of the Territory to veterans of World War II as declared in Section 2 of the Act, the revenues collected through the tax imposed by the Act will not permit repayment at this time.

XV.

Further answering the Alternative Writ of Mandamus defendants allege that the fund provided by the taxation imposed by the Act and to be known as the Alaska World War II Veterans' Revolving Fund is, under the provisions of the law, required to be used for two purposes; the first of which is to

make and guarantee loans and pay bonuses, and the second of which is to refund to the Territorial Treasury the sum of \$350,000.00 advanced to the fund by the appropriation contained in Chapter 27 of the Session Laws of Alaska, 1946.

XVI.

That the Act provides for the payment of loans and bonuses immediately upon the passage and approval of the Act and the setting up of the administrative machinery and it provides for the repayment of the appropriation advanced by the Territory only when the revenues collected through the tax will permit, provided it is repaid not later than four years after the effective date of the Act.

XVII.

That in the administration of the Act the Board has decided that the time for repayment of the appropriation to the Territory is a matter left to the discretion of the Board and that the intent and purpose of the Act is that the veterans' loans and bonuses should receive first consideration and repayment of the appropriation to the Territory should be the second consideration; provided that payment is made within four years from the date of the passage of the Act, and that the period of four years has not yet expired but only the period of 16 months. [8]

Wherefore, defendants pray that this certain action be dismissed and that the Petition for Writ of

Mandamus be denied and that the Court make all necessary orders as are meet in the premises.

H. L. FAULKNER,
FAULKNER & BANFIELD,
Attorneys for Defendants.

United States of America,
Territory of Alaska—ss.

I, the undersigned, Norman Haley, being first duly sworn, depose and say; that I am one of the defendants hereinabove named and make this affidavit on behalf of all the defendants for the reason that none of the defendants is within 100 miles of the place where this affidavit is required to be made; that I have read the foregoing Answer and know its contents and that the facts stated therein are true and correct as I verily believe.

NORMAN HALEY.

Subscribed and sworn to before me this 22nd day of August, 1947.

[Seal] H. L. FAULKNER,
Notary Public for Alaska.

My Commission expires August 7, 1948.

Copy received August 22, 1947.

RALPH J. RIVERS,
Attorney for Plaintiff.

[Endorsed]: Filed August 22, 1947.

[Title of District Court and Cause.]

REPLY

Comes now the Plaintiff and for reply to the Affirmative Defense contained in the Answer of Defendants to Plaintiff's complaint and petition for writ of Mandamus and to the Alternative Writ of Mandamus, says:

1. Admits the allegations contained in paragraphs numbered I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII and XIII.

2. Plaintiff denies each and every allegation contained in Paragraph numbered XIV, saving and excepting that Plaintiff admits that the Board of Administration of the Territory of Alaska made application to the Alaska World War II Veterans' Board for repayment of the appropriation which was advanced to the Board in April 1946 in the sum of \$350,000.00, and that the said Veterans' Board declined to make such repayment.

3. Plaintiff admits the allegations contained in Paragraph numbered XV save and except that plaintiff denies that the purpose of making and guaranteeing loans and paying bonuses carries priority over the requirement of refunding to the Territorial Treasury the advanced sum of \$350,000.00.

4. Plaintiff admits the allegations contained in Paragraph numbered XVI save and except that plaintiff denies that the intent of the provision regarding repayment of the appropriation is other than mandatory as soon as revenues permit.

5. Plaintiff denies each and every allegation con-

tained in Paragraph numbered XVII save and except that plaintiff admits that the [10] board has decided matters as alleged.

Wherefore, plaintiff affirms the prayer for relief as contained in the complaint herein.

/s/ RALPH J. RIVERS,
Attorney General for Alaska.

/s/ FRANK L. OLIVER,
Assistant Attorney General,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska—ss.

Oscar G. Olson, being first duly sworn, on oath, deposes and says: That he is the plaintiff above named and that he is the duly elected, qualified and acting Treasurer for the Territory of Alaska; that he has read the foregoing Reply and knows the contents thereof, and believes the same to be true.

OSCAR G. OLSON.

Subscribed and sworn to before me this 26th day of August, 1947.

[Seal] FRANCIS G. REGAN,
Notary Public for Alaska.

My commission expires March 21, 1948.

Copy received August 26, 1947.

H. L. FAULKNER,
Attorney for Defendants.

[Endorsed]: Filed Aug. 26, 1947.

[Title of District Court and Cause.]

ORDER

This cause having come on for trial and hearing of the issues, and after argument of counsel for each party, and the court at the conclusion of the hearing having taken the matter under advisement, and now the court being fully advised in the premises; and the court having found and adjudged that the facts set forth in the Alternative Writ of Mandamus issued by this court on the 18th day of August, 1947, have been sustained by the plaintiff herein, and that plaintiff is entitled to the Writ prayed for,

It Is Hereby Ordered and Decreed that a Peremptory Writ of Mandamus be issued commanding and enjoining the defendants herein to issue and deliver to the Territorial Auditor, in regular course, not later than January 31, 1948, a voucher payable to the Territorial Treasury in the amount of \$175,-000.00, and that a voucher in the same amount be issued and so delivered not later than April 30, 1948, and that the defendants also make known to this court at Juneau, Alaska, at 2 o'clock p.m. on February 2, 1948, and again at 2 o'clock p.m. on May 3, 1948, how said defendants shall have executed said Peremptory Writ of Mandamus, and have then and there said writ.

Done this 28th day of August, 1947, at Juneau, Alaska.

GEORGE W. FOLTA,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska 1st Division at Juneau. John H. Walmer, Clerk. [12]

[Title of District Court and Cause.]

EXCEPTION TO ORDER OF COURT

Come now the defendants and except to the order of the Court made and filed herein on August 28, 1947, granting the Peremptory Writ of Mandamus as prayed for in the Complaint and Petition of plaintiff herein.

Dated at Juneau, Alaska, September 25, 1947.

FAULKNER AND BANFIELD,
Attorneys for Defendants.

Copy received September 26th, 1947.

/s/ RALPH J. RIVERS,
Attorney General of Alaska.
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 25, 1947. [13]

[Title of District Court and Cause.]

PEREMPTORY WRIT OF MANDAMUS

To the above entitled Defendants, Greeting:

Whereas, upon trial and hearing of the issues in the above entitled action, this court has duly found and adjudged that the facts set forth in the Alternative Writ of Mandamus issued by this Court on the 18th day of August, 1947, have been sustained by the plaintiff herein and that you should repay to the Territorial Treasury the sum of \$350,000.00 which was appropriated as a loan to the Alaska World War II Veterans' Board by Chapter 27 S. L. A. 1946, through issuance of appropriate

vouchers executed by the Commissioner of Veterans' Affairs, as follows: One of said vouchers in the sum of \$175,000.00 to be issued not later than January 31, 1948, and the other in the same amount to be issued not later than April 30, 1948.

Now, Therefore, the Court deeming that justice should be done in this behalf to the plaintiff herein, does hereby command and enjoin you that not later than January 31, 1948, you issue and forward to the Territorial Auditor in regular course, a voucher payable to the Territorial Treasury in the amount of \$175,000.00, and that a voucher in the same amount be issued and so delivered not later than April 30, 1948;

And this Court does also command that you make known to this Court at Juneau, Alaska, at 2 o'clock p.m. on February 2, 1948, and [14] again at 2 o'clock p.m. on May 3, 1948, how you shall have executed this writ, and have you then and there this writ.

Witness the Hon. George W. Folta, Judge of said Court this 28th day of August, 1947.

[Seal] JOHN H. WALMER,
Clerk.

Copy received August 29, 1947.

FAULKNER AND BANFIELD,
M. J. LYMAN,
Secretary,
Attorney for Defendants.

[Endorsed]: Filed Aug. 29, 1947.

[Title of District Court and Cause.]

PETITION FOR LEAVE TO APPEAL TO
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

Comes now the above named defendants and each of them in the above entitled action and conceiving and believing themselves to be aggrieved by the Order of the above entitled Court entered against them on August 28, 1947, at Juneau, Alaska, and the Peremptory Writ of Mandamus issued on that day, do hereby petition the above entitled Court for leave to appeal from the order and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby file their Assignments of Error asserted and relied upon by them upon the appeal and they petition that an order be entered herein allowing the applicants and the defendants above named to prosecute this appeal to the United States Circuit Court of Appeals in the manner provided by law and the rules of the Court; and that a citation may issue and be directed to the plaintiff above named, citing him to appear in the United States Circuit Court of Appeals for the Ninth Circuit, 40 days from the date of the citation; and that an order be made directing the Clerk of the above entitled Court to prepare the transcript of record, proceedings and papers, and all of them upon which the order was made and entered, and duly authenticate it and send it to the United States Circuit Court of Appeals for [16] the Ninth Circuit.

Dated at Juneau, Alaska, September 26th, 1947.

FAULKNER & BANFIELD,
Attorney for Petitioners.

Copy received September 26th, 1947.

/s/ RALPH J. RIVERS,
Attorney General of Alaska,
Attorney for Plaintiff.

[Endorsed] Filed Sept. 25, 1947. [17]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Come now the above named defendants and each of them and complain of the judgment rendered and the Order of the Court entered in this cause on August 28, 1947, in the above entitled Court, and the whole thereof, and aver that in the proceedings in this cause manifest error has occurred to the prejudice of the defendants and each of them, of which they make the following

Assignments of Error

which they assert and intend to rely upon in the United States Circuit Court of Appeals for the Ninth Circuit upon an appeal to that Court.

I.

The Order heretofore mentioned entered by the Court on August 28, 1947, directing that a Peremptory Writ of Mandamus be issued commanding the defendants to issue and deliver to the Territorial Auditor in regular course not later than January 31, 1948, a voucher payable to the Territorial

Treasury in the amount of \$175,000.00 and a voucher in the same amount not later than April 30, 1948, is entered contrary to law and without authority of law and that the Peremptory Writ of Mandamus issued pursuant to that order is of no force and effect for the reason that the [18] remedy of mandamus is not proper and not available to plaintiff in the above entitled cause; and the Court erred in making and entering the order and in ordering the Peremptory Writ of Mandamus to issue.

Wherefore defendants and appellants pray that the judgment and order may be reversed.

Dated at Juneau, Alaska, September 26th, 1947.

FAULKNER & BANFIELD,
Attorneys for Defendants.

Copy received this 26th day of September, 1947.

/s/ RALPH J. RIVERS,
Attorney General of Alaska,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 25, 1947. [19]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO APPEAL

Upon reading and filing the petition of the above named defendants and it appearing that the petitioners and defendants have heretofore filed their Notice of Appeal and thereafter filed a cost bond in the sum of \$250.00 and having filed Assignments of Error and petition for allowance of appeal,

Now, Therefore, the law and the premises being fully understood and considered by the Court,

It Is Hereby Ordered That leave be, and hereby is, granted to the petitioners, defendants and appellants to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled Court made on August 28, 1947, and entered herein directing the issuance of a Peremptory Writ of Mandamus against the defendants, and

It Is Further Ordered that the Clerk of the District Court for the Territory of Alaska, Division Number One at Juneau be, and he is hereby directed and ordered to prepare and certify a transcript of evidence, exhibits and all records, proceedings, papers and judgment in the above entitled cause and transmit them to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within 40 days from [20] date and it is further ordered that the cost bond on appeal be and it is hereby approved.

It Is Further Ordered that if stay of execution is desired that defendants file herein a supersedeas bond in the sum of \$350,000.00 on or before January 31, 1948, and that the order of the Court heretofore made on August 28, 1947, be stayed from and after the date of the filing and approval of the bond.

Dated at Juneau, Alaska, this 26th day of September, 1947.

/s/ GEO. W. FOLTA,
District Judge.

Copy received September 26th, 1947.

/s/ RALPH J. RIVERS,

Attorney General of Alaska,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 26, 1947. [21]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, the above named petitioners and defendants as principal and E. L. Hunter as surety are held and firmly bound under the above named plaintiff and the Territory of Alaska in the sum of \$250.00 to be paid to the Territory of Alaska, and for the payment of which well and truly to be made we bind ourselves and each of us and each of our heirs, executors, administrators and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the 26th day of September, 1947.

Whereas the above named petitioners and defendants as appellants seek to prosecute an appeal in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and order rendered in the above entitled action by the District Court for the Territory of Alaska, Division Number One on August 28, 1947,

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their appeal [22] to effect and answer all costs and damages that may be adjudged if they

shall fail to make good their appeal, then this obligation to be void, which is otherwise to remain in full force and effect.

THE ALASKA WORLD WAR II VETERANS'
BOARD and ROBERT E. ELLIS, JOHN S.
HELLENTHAL, JOHN M. CROSS, L. EM-
BERT DEMMERT and PAUL SOLKA, JR.,
members of said Board, and NORMAN
HALEY, executive officer of said Board.

By /s/ H. L. FAULKNER,

Their Agent and Attorney.

/s/ E. L. HUNTER,

Surety.

United States of America,
Territory of Alaska—ss.

I, the undersigned whose name is subscribed to the foregoing Cost Bond on Appeal as surety thereon, being first duly sworn, depose and say: That I am a resident of Juneau, Alaska, over the age of 21 years and not an attorney or counselor at law, marshal, deputy marshal, clerk of any court or other officer of any court and that I am worth the sum of \$500.00 over and above all my just debts and liabilities exclusive of property exempt from execution.

/s/ E. L. HUNTER.

Subscribed and sworn to before me this 26th day of September, 1947.

/s/ MARY JANE LYMAN,

Notary Public for Alaska.

My commission expires Aug. 7, 1948.

Approved this 26th day of September, 1947.

/s/ GEO. W. FOLTA,

Judge.

Copy received 26th day of September, 1947.

/s/ RALPH J. RIVERS,

Attorney General for Alaska,

Attorney for Plaintiff.

[Endorsed]: Filed. [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named petitioners and defendants hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of the Court entered in the above entitled cause on August 28, 1947, in which order a Peremptory Writ of Mandamus is commanded to be issued against the defendants commanding them to pay over to the Territorial Treasury of Alaska the sum of \$175,000.00 not later than January 31, 1948, and the same sum not later than April 30, 1948.

Dated at Juneau, Alaska, September 26th, 1947.

/s/ H. L. FAULKNER,

Attorneys for Defendants
and Petitioners.

Copy received September 26th, 1947.

/s/ RALPH J. RIVERS,

Attorney General of Alaska,
Attorney for Plaintiffs.

[Endorsed]: Filed Sept. 26, 1947. [24]

[Title of District Court and Cause.]

CITATION

The President of the United States of America to
Territory of Alaska, ex rel Oscar G. Olson,
Plaintiff Above Named, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals in the City of San Francisco, State of California, within 40 days from the date hereof, pursuant to an order allowing an appeal, of record in the Office of the Clerk of the District Court for the Territory of Alaska, Division Number One at Juneau, wherein The Alaska World War II Veterans' Board and Robert E. Ellis, John S. Hellenthal, John M. Cross, L. Embert Demmert and Paul Solka, Jr., members of said Board, and Norman Haley, executive officer of said Board, defendants above named, are appellants, and you are appellee, to show cause, if any there be, why the judgment and order rendered against the appellants, as in the order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. W. Folta, Judge of the United States District Court for the Territory of Alaska, Division Number One, at Juneau, the 26th day of September, 1947. [25]

/s/ GEORGE W. FOLTA,

United States District Judge,
Territory of Alaska,
Division Number One.

Copy received September 26th, 1947.

/s/ RALPH J. RIVERS,

Attorney General of Alaska,
Attorney for Appellees.

[Endorsed]: Filed Sept. 26, 1947. [26]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated and agreed between Ralph J. Rivers, Attorney General of Alaska and attorney for plaintiff-appellee in the above entitled cause, and Faulkner and Banfield, attorneys for defendants-appellants, that upon the appeal in this cause no supersedeas bond need be filed prior to January 31, 1948, and that execution and the order of the Court may be stayed only from the time of filing of the supersedeas bond.

It Is Further Stipulated that in printing the record in this cause on appeal the title of all papers may be omitted.

Dated at Juneau, Alaska, September 26th, 1947.

/s/ RALPH J. RIVERS,

Attorney General for Alaska,
Attorney for Plaintiff-
Appellee.

FAULKNER & BANFIELD,
Attorneys for Defendants-
Appellants.

[Endorsed]: Filed Sept. 26, 1947. [27]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

Please prepare as the record on appeal in the above entitled cause the following:

1. Complaint and Petition for Writ of Mandamus.

2. Answer of Defendants to Plaintiff's Complaint and Petition and to the Alternative Writ of Mandamus.

3. Reply of Plaintiff.

4. Order of the Court dated August 28, 1947, directing issuance of Peremptory Writ of Mandamus, and exception thereto.

5. Peremptory Writ of Mandamus dated August 28, 1947.

6. Petition for Leave to Appeal to the Circuit Court of Appeals.

7. Assignment of Error.

8. Order Granting Leave to Appeal.

9. Notice of Appeal.

10. Cost Bond on Appeal.

11. Citation.

12. This Praecipe.

13. Stipulation re supersedeas bond and printing of record.

Dated at Juneau, Alaska, September 26th, 1947.

FAULKNER & BANFIELD,
Attorneys for Defendants-
Appellants.

Copy received September 26th, 1947.

/s/ RALPH J. RIVERS,

Attorney General of Alaska,
Attorney for Plaintiff-
Appellees.

[Endorsed]: Filed Sept. 26, 1947. [29]

[Title of District Court and Cause.]

CERTIFICATE

I, John H. Walmer, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 29 pages of typewritten matter, numbered from 1 to 29, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in cause No. 5753-A, wherein The Alaska World War II Veterans' Board et al, are Defendant-Appellants and the Territory of Alaska, ex rel Oscar G. Olson is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of an appeal and Citation issued in this cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Four & 70/100 Dollars has been paid to me by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 7th day of October, 1947.

[Seal] JOHN H. WALMER,
Clerk.

By /s/ J. W. LEIVERS,
Deputy.

[Endorsed]: No. 11756. United States Circuit Court of Appeals for the Ninth Circuit. The Alaska World War II Veterans' Board and Robert Ellis, John S. Hellenthal, John M. Cross, L. Embert Demmert and Paul Solka, Jr., members of said Board, and Norman Haley, executive officer of said Board, Appellants, vs. Territory of Alaska, ex rel Oscar G. Olson, Appellee. Transcript of Record. Upon Appeal from the District Court of the Territory of Alaska, Division Number One.

Filed October 13, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.



No. 11,756

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE ALASKA WORLD WAR II VETERANS'
BOARD and ROBERT E. ELLIS, JOHN S.
HELLENTHAL, JOHN M. CROSS, L. EM-
BERT DEMMERT and PAUL SOLKA, JR.,
members of said Board, and NORMAN
HALEY, Executive officer of said Board,
Appellants,

vs.

TERRITORY OF ALASKA ex rel. OSCAR G.
OLSON,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Division No. 1.

BRIEF FOR APPELLANTS.

FILED

NOV 18 1947

PAUL P. O'BRIEN,
CLERK

FAULKNER & BANFIELD,
H. L. FAULKNER,
NORMAN C. BANFIELD,
Juneau, Alaska,

Attorneys for Appellants.

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No. 11,756

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HELLENTHAL, JOHN M. CROSS, L. EM-
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members of said Board, and NORMAN
HALEY, Executive officer of said Board,

Appellants,

vs.

TERRITORY OF ALASKA ex rel. OSCAR G.
OLSON,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Division No. 1.

BRIEF FOR APPELLANTS.

THE PLEADINGS.

In this case there is no Bill of Exceptions and the matters at issue all arise on the pleadings and all the pertinent facts are admitted.

Appellee, plaintiff below, brings this action against the Appellants, the defendants below, to obtain peremptory Writ of Mandamus ordering the defendants

to pay into the Treasury of the Territory of Alaska the sum of \$350,000.00 which had been appropriated to the defendants by the Alaska Legislature for the purpose of setting up a revolving fund for the payment of veterans' bonuses and making loans to veterans under the provisions of Chapter 27, Session Laws of Alaska, 1946.

The appellants, defendants below, answered plaintiff's complaint and petition for the Writ; plaintiff filed a reply and the case was heard before the Court, and on August 28, 1947, the Court entered an order directing the issuance of the Peremptory Writ prayed for, and the Writ was immediately issued on the same day. The Court made no Findings or Conclusions of Law. Appellants, defendants below, filed exceptions to the order and the appeal follows:

STATEMENT OF FACTS AND ISSUES.

There is no dispute as to the pertinent facts and the only issue involved is whether the Court below had the power to issue the peremptory writ of mandamus in this case. That is to say whether mandamus was a proper remedy. In April 1946, the Legislature of the Territory of Alaska passed an Act known as the Alaska World War II Veterans Act. (Chapter 27 Session Laws of Alaska, 1946.) This Act provides for loans and bonuses to veterans of World War II and it makes provision for a sales tax and a tax on services to raise the necessary funds. A Board is created by the Act known as the Alaska World War II Veterans Board, and provision is made for the appointment of an executive officer of the Board.

In order that the Board might function immediately and since no funds would be received from the tax imposed, for a period of several months, an appropriation was made by the Legislature and this was done by means of Section 5 of the Act which reads as follows:

“Section 5. Appropriation. There is hereby appropriated the sum of three hundred fifty thousand dollars (\$350,000.00) for deposit in the Alaska World War II Veterans' Revolving Fund to be used for the purpose of this Act, including expenses of administration; provided, however, that the Board shall pay back such sum to the Territorial Treasury as soon as revenues collected through the tax imposed by this Act will permit, but not later than four years after the effective date hereof.”

The petition of plaintiff below sets forth in paragraph 5 that the revenues collected through the tax imposed by the Act amounted to, at the time the suit was filed, one and three quarter million dollars, and that the anticipated revenues to be collected for the September 1947 quarter and payable in October will equal approximately \$300,000.00 so that revenues collected through the tax now permit the repayment by the Board of the original appropriation of \$350,000.00. (Trans. p. 3.)

Then it is alleged in the petition that a demand was made upon the Board to repay to the Territorial Treasury, the initial appropriation on installment basis and that the Board had refused to make payments. (Trans. p. 4.)

It is then set forth in the petition that a serious financial shortage exists and that the Territory requires repayment of the initial appropriation and that the refusal on the part of the Board to make repayment is arbitrary and unreasonable and amounts to an abuse of authority contrary to law, etc. (Trans. p. 4.)

The defendants' answer denied that the revenues collected through the veterans tax permitted repayment of the sum of \$350,000.00 by the Board to the general treasury or any portion thereof. (Trans. pp. 6-7.)

The defendants below, appellants here, then set up an affirmative defense to plaintiff's complaint and petition for Writ of Mandamus. (Trans. pp. 7-14.)

This affirmative defense alleges:

First: The passage of the act known as the Alaska World War II Veterans Act.

Second: That the purpose of the Act as shown therein was to "partially discharge the obligations of the Territory of Alaska to those of its citizens who are serving or have served in the Army, Navy, Marine Corps, or Coast Guard during World War II."

Third: That the Act provides for the appointment of a Board and the Board is named.

Fourth: That the Act provided for the appointment of a Commissioner of Veterans Affairs.

Fifth: The purposes of the Act.

Sixth: That the Act took effect immediately upon its passage and approval, thereby setting up the Board and providing for the operation of the law immediately upon its passage and approval.

Seventh: That the Act levies a tax for the creation of the fund.

Eighth: The date the Act went into effect and the date when the first taxes were payable, and reference is made to Section 5 of the Act.

Ninth: That loans and bonuses have been paid to veterans since the date of the passage and approval of the Act and the setting up of the Board, etc.

Tenth: That there are between 6500 and 7000 veterans in Alaska and that many applications began to come into the Board as soon as its machinery was set up.

Eleventh: That the total sum of \$1,851,012.35 had been paid into the veterans fund through taxes up to the date of the filing of the petition and that adding thereto the amount of the original appropriation of the Territory \$350,000.00 and a small amount of interest collected, the total revenues coming into the hands of the Commissioner and the Board amounted to \$2,227,232.01.

Twelfth: That the Board had expended \$4937.34 in the purchase of equipment, it had advanced in loans and bonuses all remaining sums coming into its hands at the time the petition was

filed except the sum of \$388,795.35, which was on hand at the date of the alternative Writ, or in other words that the Board had advanced to that date in loans and bonuses \$1,741,044.98.

Thirteenth: That the Board had on hand 937 unpaid applications for bonuses totaling \$348,740.00, and 308 pending applications for loans none of which had yet been made and totalling \$2,066,320.00, and that in addition thereto the Commissioner had received 226 inquiries for bonuses without formal applications and 66 inquiries regarding loans where no formal applications had as yet been made.

Fourteenth: That when the application was made to the Board to refund the initial appropriation to the Territory, the Board had declined to make repayment for the reason that on account of the small balance of funds on hand and the large number of applications for loans and bonuses in the judgment of the Board and in the light of the general purposes of the Act, which was to make loans and pay bonuses to veterans in partial discharge of the recognized and declared obligation of the Territory to veterans of World War II, the revenues collected through the tax imposed by the Act would not permit repayment at this time.

Fifteenth: That the revenues provided by taxation imposed by the Act were required to be used for two purposes—the first of which was to

make and guarantee loans and pay bonuses and the second of which was to repay the amount advanced by the Territory, within four years from the effective date of the Act.

Sixteenth: That the Act provided for the payment of loans and bonuses immediately upon passage and approval of the Act and the setting up of the administrative machinery, and for the repayment of the appropriation advanced by the Territory only when revenues collected through the tax would permit, provided it was repaid not later than four years after the effective date of the Act.

Seventeenth: That the Board interpreted the Act to mean that the time for repayment of the appropriation to the Territory is a matter left in the discretion of the Board and that the intent and purpose of the Act is that the veterans loans and bonuses should receive first consideration and repayment of the appropriation to the Territory second consideration, provided repayment was made within four years from the passage date of the Act.

The plaintiff below, appellee here, filed a reply admitting all the allegations contained in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Appellee's affirmative answer. (Trans. p. 15.)

With reference to paragraph XIV the Appellee admits that the Board declined to make the payment of

the \$350,000.00 to the Territorial Treasury but he denies the reasons set up therefor. (Trans. p. 15.)

With reference to the allegations contained in paragraph XV Appellee denies in effect that the interpretation placed upon the provisions of Section 5 of the Act by the Board is correct. (Trans. p. 15.)

With reference to paragraph XVI of the affirmative defense plaintiff appellee in effect denies that the interpretation placed upon the Act by the Board was correct. (Trans. p. 15.)

Referring to the allegations contained in paragraph XVII the Appellee again admits in effect that the Board made a decision with reference to repayment of the appropriation, but denies that the decision was a proper one. (Trans. pp. 15-16.)

The pleadings raised one issue and that is whether or not the provisions of Section 5 of Chapter 27 of the Laws of Alaska 1946 leave to the discretion of the Alaska World War II Veterans Board the decision of the matter as to when the revenues collected through the tax imposed by the Act will within the four year period, permit repayment to the Territorial Treasury of the initial appropriation of \$350,000.00, or whether if the Board, being charged with the administration of this Act and the carrying out of the expressed intent and purpose of the Act can be required by a mandate of the Court to make repayment of the initial appropriation at any particular time. In other words is mandamus a remedy available to the plaintiff? (Trans. pp. 2-16.)

BASIS OF JURISDICTION.

The District Court had jurisdiction of this case under the provisions of Section 1091 Compiled Laws of Alaska, 1933, Section 101, Title 28, U.S.C.A.

The Circuit Court of Appeals has jurisdiction to review the final judgment in this cause upon appeal under Section 225, Title 28 U.S.C.A. as amended.

ARGUMENT AND AUTHORITIES.

Appellants adopt the full assignment of errors as their point relied on here.

There is only one assignment of error and that is that the order of the Court of August 28, 1947 directing the issuance of a peremptory Writ of Mandamus was contrary to law and without authority of law and that the peremptory Writ issued pursuant thereto is of no force or effect for the reason that mandamus is not the proper remedy and was not available to the plaintiff in this cause, and that the Court erred in making the order that the peremptory Writ of Mandamus should issue. This assignment is directed to the contention of Appellee that the District Court had the power to direct the Alaska World War II Veterans Board to make repayment to the Territorial Treasury, at any particular time, of the appropriation made to the Board to carry out the purposes of the Act.

We contend that the provisions of Section 5, Chapter 27, Session Laws of Alaska, 1946, making the ini-

tial appropriation of \$350,000.00 to the Alaska World War II Veterans' revolving fund gives the Board the discretion and the right to say just when the revenues collected through the tax imposed by the Act will permit repayment to the Territorial Treasury so long as repayment is made at any time within four years from the effective date of the Act. The law does not say that this \$350,000.00 shall be paid back from the first revenues received. If it did it would have been an idle thing to have made the appropriation. The Act does not say it shall be paid back when any particular sum shall have been collected or when 25% or 50% of the pending applications shall have been acted upon; it does not say that it shall be paid back whenever there happens to be a balance of more than \$350,000.00 on hand in the fund regardless of the merit or status of the applicants who may already have applications in for more than that amount. It does not say that the appropriation shall be paid back at any particular time. It sets no limit on it except that it must be paid back within four years and it certainly leaves to the discretion of some person or some board or body to say when the revenues collected through the tax imposed will permit the repayment of the appropriation. If that had not been the intent of the law it would have been easy for the Legislature to have specified just what conditions must exist at the time when repayment should be due. The Legislature did not do that but left it entirely to the discretion of the Board. Mandamus will lie of course to compel a Board to act one way or the other when that duty is imposed upon it by law, but it will not direct it how to act.

In this case the plaintiff alleges in his petition that the Board has acted by refusing to make repayment. The Board admits this and sets up in the affirmative defense why it refused to make repayment, and we do not think it proper for a Court by Writ of Mandamus to substitute its judgment and discretion for that of the Board where the judgment and discretion have been so plainly committed to the Board.

The pleadings show that the Board had paid certain bonuses, it had made and guaranteed certain loans, it had before it at the time the petition was filed other applications for bonuses and loans in a far greater sum than those already acted upon and surely it was for the Board to say whether the revenues which it had collected at that date would safely permit the repayment of the initial appropriation to the Territory.

In considering this point we must bear in mind the purposes of the Act for the purpose and intent of the Legislature is one of the first considerations in interpretation of statutes. It is one of the cardinal principles that in the interpretation of statutes the intention of the Legislature is to be derived from a view of the whole and every part of the statute considered together in the light of the general purpose of the Act.

As was said in the case of *Federal Land Bank v. Howell*, 123 Fed. (2d), page 50:

“When words, phrases, clauses, sentences, or provisions are not explicit, the intention is to be collected from the context, tenor, spirit, occasion and necessity of the law and the remedy in view.”

Now let us see what was the purpose and intent of Chapter 27 Session Laws of Alaska 1946, and what duties were imposed upon the Board. We find that expressed in the first sentence of sub-division (a) of Section 2 of the Act.

“(a) Membership: There is hereby created the Alaska World War II Veterans Board whose duty it shall be to carry out the purposes and provisions of this Act and thereby partially discharge the obligations of the Territory of Alaska to those of its citizens who are serving or have served in the Army, Navy, Marine Corps or Coast Guard during World War II.”

Then again in sub-division (d) of Section 2 we find the duty imposed upon the Board to * * *

“* * * formulate general policies which the Commissioner shall observe and follow; adopt rules and regulations which shall be binding upon the commissioner, members of the Board and all persons employed in the performance of their duty under this Act * * *”

Then by the same subdivision the Board is also given the power to * * *

“adopt rules and regulations necessary for the conduct of its business and for the carrying out of the provisions of this Act, and make necessary rulings and regulations to maintain such standards * * *”

The Board is not only given the power to make rulings and regulations but it is also given the power under sub-division (e) of Section 2 to * * *

“authorize the Commissioner, under such rules, regulations and policies as it may adopt, to make loans of the kind and character hereinafter set forth * * *”

in other words the Board is not bound down by any strict formula or any detailed provisions for its conduct and procedure, but it is given the power to *adopt policies* and certainly the Board must have the discretion in the furtherance of its policy to say whether it is going to treat all applicants alike so far as possible where qualifications are equal, and that it is not its policy to serve the first 20 or 25% of applicants who apply, and then turn over the sum of \$350,000.00 to the Territorial Treasury and allow the remaining applicants, far greater in number, to wait for their bonuses and loans. That is apparently not the policy of the Board; and not being the policy it was certainly within the power and discretion of the Board to deny the application of the Territorial Treasury to pay back the \$350,000.00 after only a little over a year of the operation of the Act when the law seems to plainly vest the discretion in the Board to make repayment when in its judgment, all things considered, the revenues will permit, so long as this is done within 4 years.

The veterans who have already received loans and bonuses constituted little more than 25% of the estimated total number of veterans in the Territory who are eligible for loans and bonuses, and at the time of the filing of the petition there were 937 unpaid appli-

cations pending for bonuses totaling \$348,740.00; and 308 applications for loans not yet acted upon which totalled \$2,066,320.00, and in addition thereto hundreds of inquiries for bonuses and loans without formal applications. Surely the Veterans Board was vested by the provisions of the Act with the power of determining when the revenues would permit the repayment of this appropriation, taking into consideration the amounts collected, the amounts paid out, the number of applications for loans and bonuses pending and the general prospects. They are surely given the discretion to determine whether, since the primary purpose of the act is to make loans and pay bonuses to veterans, those deserving ones who have been late with their applications and who had not already been served should not be entitled to receive as much consideration as some of those who had easier access to the Commissioner through reason of residence and who came in early with their applications. Alaska is a large Territory. Many deserving veterans live in remote parts of the Territory's 600,000 square miles and in the very nature of things those who live in the vicinity of Juneau where the Commissioner has his headquarters, are served first.

The Board is the one upon whom is imposed the duty of making repayment under the provisions of Section 5 of the Act and the Board is given discretion to determine just when this may safely be done; and we submit that the Board cannot be commanded by mandamus when and how or in what manner they are to exercise that discretion.

In the case of *Edmonds v. Board of Examiners—Optometry etc.* decided by this Court in 1939 and found in 106 Fed. (2d), page 904, we find as follows:

“With respect to the power to issue writs of mandamus, the courts have frequently spoken. ‘Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion * * *’ *Work v. Rives*, 267 U.S. 175, 177. ‘Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.’ *Wilbur v. United States*, 281 U.S. 206, 218. See also: *United States ex rel. Girard Co. v. Helvering*, 301 U.S. 540, 543; *Miguel v. McCarl*, 291 U.S. 442, 451; *Work v. McAlester, Etc. Co.*, 262 U.S. 200, 208; *Alaska Smokless Coal Co. v. Lane*, 250 U.S. 549, 555; *Noble v. Union River Logging Railroad*, 147 U.S. 165, 171; *Redfield v. Windom*, 137 U.S. 636, 644; *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 48.”

The law seems to be well settled on this point and it may be summed up in the language of the Supreme Court of the United States in the case of *United States, ex rel. Girard Tea Company v. Helvering*, 301 U.S., page 543 as follows:

“Where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and

peremptory, mandamus is not an appropriate remedy." (Citing many cases.)

Again in the case of *Wilbur v. United States, ex rel. Kadrie*, 281 U.S. page 218, the Supreme Court says:

"The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly described as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly described but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

In the case of *United States v. Black*, 128 U.S. page 40, the Supreme Court of the United States uses the following language:

"The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a

mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then if they refuse a mandamus may be issued to compel them.

Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the Relator and his decision was confirmed by the Secretary of the Interior as evidenced by his signature on the certificate. Whether if the law were properly before us for consideration we should be of the same opinion or of a different opinion is of no consequence to a decision in this case. We have no appellate power over the Commissioner and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts."

Again in the case of *Interstate Commerce Commission v. N. Y., N. H. & H. R. Co.* found in 287 U.S. page 202, we find this language in the decision:

"Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, it is regarded as involving the character or judgment or discretion (*Wilbur vs. U. S. Supra*), and mandamus is thereby excluded."

Even if the statute in this case which requires the veterans board to pay back to the Territory the initial appropriation of \$350,000.00 were vague and indefinite and not clear, according to the decisions of the Courts

mandamus could not be used to require the Board to act at any particular time or in any particular manner. However, we think the language of Section 5 of Chapter 27 of the Session Laws of Alaska 1946 is not at all vague and we think it plainly confers upon the Board the discretion to say just when within the 4 year period allowed the revenues derived from taxation will permit the repayment of the initial appropriation. No time is specified. We think the general rule is stated in 59 C. J. Section 634 at page 1078 as follows:

“A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of a certain act which may as effectually be done at any other time is usually regarded as directory.”

In the case of *Childers v. Brown*, 158 Pac., page 166, in dealing with a right of a debtor to claim an exemption of property levied upon under execution the Supreme Court of Oregon was called upon to interpret the phrase “as soon as” which is the phrase found in Section 5 of Chapter 27, Laws of Alaska, 1946, and we find the following in the decision of the Supreme Court in that case:

“A strict application of the language of the statute would require the debtor to assert his right of redemption ‘at the time of the levy’ or ‘as soon’ as the levy shall be known to him, but the words employed are softened and relieved of any undue severity when viewed in the light of the rule of liberal construction. While it is true that, as taught in *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 161, 41 Pac. 390, the right of exemption is a privilege, which it must be conceded can be waived by the consent of the debtor or by his failure to assert his rights (12 A. & E. Ency. Law (2nd Ed.) 191; 11 R. C. L. p. 539), nevertheless a failure to select exempted property at the exact time of a levy, even though the debtor is present, will not alone operate as a waiver because the debtor has a reasonable time after he knows of the levy to claim his exemption. If the words ‘at the time of the levy’ are given a strict construction, they would signify the exact moment of the levy, and would indicate ‘simultaneousness,’ as distinguished from ‘subsequence,’ and therefore, within this severe meaning, the debtor, if present at the time of the seizure, would lose his right of exemption, unless he asserted his claim at the very moment of the levy. When used in reference to time the word ‘at’ does not always mean the exact moment or day, but certainly in many and perhaps in most instances it expresses nearness, closeness, and proximity, and consequently may denote a reasonable time. 5 C. J. 1427. The words ‘as soon as’ likewise have a restricted and an unrestricted signification. The narrowed meaning would require the debtor to act the very moment he learns of the levy, while the broader interpretation would afford a reasonable time. Obeying

the teaching of precedents and adopting the liberal, rather than the severe, meaning, the language of the statute permits the debtor, if he acts before sale, to assert his right of exemption within a reasonable time after the levy becomes known to him whether he was present or absent at the time of the seizure.”

We shall not burden the Court with a reference to the many recent decisions of the Supreme Court of the United States and the Circuit Court of Appeals to the effect that the interpretation of a statute by a board or administrator appointed to administer it is to be given great weight and the administrator's interpretation is very persuasive with the Court. Here the Board interpreted Section 5 of the Veterans Act to mean that in the administration of the law with the hundreds of applications it had on hand and the great demand for funds and the necessity for carrying out the purpose of the Act so far as the funds would permit, the Board had the power to decide just at what time the revenues collected through taxation would permit it to refund the initial appropriation. The Board decided in the light of all the circumstances and conditions surrounding the administration of the Act and in endeavoring to carry out the expressed purpose of the Legislature in enacting the law that the time had not yet come when the revenues would permit a repayment of this appropriation.

Of course if the Board should wait four years and at the end of that time not have paid back the \$350,000.00 mandamus would be a proper remedy, but that is not the case here. This mandamus action is brought

almost at the very outset of the Board's administration of the Act at a time when it had already paid out large sums in bonuses and advanced other large sums in loans and had on hand hundreds of applications which were just as meritorious and worthy of consideration as those already acted upon, and at a time before the Board was in possession of sufficient facts to determine just what would be the total requirements for carrying out the purpose of the act. Surely the Board was set up for the very purpose, among other things, of administering the funds, discharging the obligation of the Territory to the veterans, and carrying out the purposes of the Act as expressed by the Legislature and surely it is plain that the Act gave to the Board the discretion and the power to say when this initial appropriation could be safely and fairly repaid bearing in mind that the only limitation placed upon the Board was that it must be repaid within four years from the effective date of the Act.

We respectfully pray that the Order of the Trial Court be reversed and the petition of the plaintiff below be dismissed.

Dated, Juneau, Alaska,
November 12, 1947.

Respectfully submitted,
FAULKNER & BANFIELD,
H. L. FAULKNER,
NORMAN C. BANFIELD,
Attorneys for Appellants.

In the
United States Circuit Court of Appeals
For the Ninth Circuit

THE ALASKA WORLD WAR II VET-
ERANS' BOARD AND ROBERT E.
ELLIS, JOHN S. HELLENTHAL,
JOHN M. CROSS, L. EMBERT DEM-
MERT AND PAUL SOLKA, JR.,
members of said Board, and NORMAN
HALEY, Executive Officer of said
board,

Appellants,

vs.

TERRITORY OF ALASKA ex rel.
OSCAR G. OLSON,

Appellee.

ON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
DIVISION NO. 1

BRIEF FOR APPELLEE

RALPH J. RIVERS,
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Juneau, Alaska.

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FILED
DEC 22 1947

PAUL P. O'BRIEN, CLERK

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In the
United States Circuit Court of Appeals
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VS.

TERRITORY OF ALASKA ex rel.
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Appellee.

ON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
DIVISION NO. 1

BRIEF FOR APPELLEE

THE PLEADINGS

The Territory of Alaska, ex rel Oscar G. Olson (Territorial Treasurer), plaintiff below, brings this action for a peremptory Writ of Mandamus ordering the defendants, The Alaska World War II Veterans' Board and the members thereof, to pay into the Treasury of the Territory of Alaska the sum of \$350,000.00 which had been appropriated by the Alaska Legislature as an initial implementation of the Territorial Veterans' Loan and Bonus program. The pleadings refer to Chapter 27 Session Laws of Alaska 1946, which contains the appropriation in question, and in which pertinent statutory provisions are found. The complaint proceeds on the basis that the facts alleged coupled with the mandatory language of that portion of the Act which pertains to repayment show a clear duty on the part of the Board to honor the Territory's demand and bring about issuance of appropriate vouchers by the Board's administrative officer. Briefly stated, the Board contends that the statute is not mandatory but vests the Board with full discretion in determining when the loan in question should be repaid within the prescribed four-year maximum period.

THE ISSUE OF LAW

If the Legislature has given the Board full discretion, as contended by counsel for appellants, then the Court would not interfere and mandamus would not be a proper remedy. However, if the duty to perform

the repayment function as requested by the Territory is clear, then mandamus would lie and the decision of the Court below should be affirmed.

STATEMENT OF FACTS

As stated by counsel in the appellants' brief, there is no dispute as to the pertinent facts:

The Alaska World War II Veterans' Act (Chapter 27, Session Laws of Alaska, 1946) was passed in April of 1946; Section 3 of said Act does contain a tax on sales and services to raise the necessary funds for loans and bonuses to Alaska's veterans of World War II and an appropriation in the sum of \$350,000.00 was made for deposit in the Alaska World War II Veterans' Revolving Fund to be used for the purposes of the Act; said money was advanced by the Territorial Treasury for said fund; demand was made for repayment, and repayment refused as alleged in the complaint. (Trans. P. 4).

Not covered by counsel, however, in appellants' statement is the following material provision found in Section 3 of the Act:

"This tax shall terminate at the end of the quarter during which three million two hundred fifty thousand dollars (\$3,250,000.00) or more has been collected hereunder, and the money derived from said tax shall be used for no purposes other than to carry out the provisions of the Alaska World War II Veterans' Act."

This is important because the Court would wish to notice proximity of full accomplishment of the tax levy. As stated in the complaint, one and three-quarter million dollars had been collected by the 18th day of August, 1947, with another \$300,000.00 forthcoming as receipts for the third quarter, during October of 1947, making a total of \$2,050,000.00 in applicable tax collections referred to in the pleadings. (Trans. p. 3). Further consideration of the record shows that the writ (Trans. p. 19) called for payment of an installment in the amount of \$175,000.00 by January 31, 1948, which would come at a time when the tax for the fourth quarter of 1947 had been collected. The writ also calls for payment of the remaining \$175,000.00 by April 30, 1948, at a time when the tax for the first quarter of 1948 will have been collected, by which time about \$2,700,000.00 of the tax will be in, leaving a duration of only two more calendar quarters on the life of the tax during which a total amount of more than \$3,250,000.00 will have been collected.

Although counsel mentions on page 4 of appellants' brief that a serious financial shortage exists in the general fund of the Territory, some amplification of that point is in order. Witnesses heard by the Court below testified that revenues for the General Fund were falling seriously short of amounts needed to meet necessary appropriations for the biennium ending March 31, 1949, and that as a result there was already a shortage of money to meet general operating

expenses of the Territory. It was also testified that vouchers in the amount of approximately \$100,000.00 had already stacked up in the Auditor's office; that vouchering for overdue school refunds to incorporated towns had been deferred, and that the usual governmental functions and social service were jeopardized. This is brought out because we will show later on in this brief that the Court may properly consider the public interest in determining a mandamus case.

ARGUMENT AND AUTHORITIES

To determine the question as to whether mandamus is a proper remedy in the instant case, we should look to the Alaska statute on the subject, which is compiled as Section 4116 Compiled Laws of Alaska, 1933, and reads as follows:

"TO WHOM WRIT MAY ISSUE; NOT TO CONTROL JUDICIAL DISCRETION. It may be issued to any inferior court, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of its or his *functions*, it shall not control *judicial discretion*. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law."

(Italics ours.)

We recognize the usual rule cited by counsel that performance of only ministerial duties may be com-

pelled by mandamus. However, the courts cannot avoid borderline cases involving possible elements of discretion. Therefore, resort should be had to the local statute involved to determine strictness of ministeriality which is required in the jurisdiction in which a particular case arises. Inasmuch as the Court may, under the Alaska statute above cited, require a board etc. to "proceed to the discharge of any of its or his *functions*" and inasmuch as said statute specifically prohibits only control of "judicial discretion" to the exclusion of varying degrees of administrative discretion, the conclusion is inescapable that adherence to a strict conception of ministeriality is not called for under Alaska law as a prerequisite to granting the writ, especially where the duty is clear and the interest of the general public is definitely at stake. In this connection the word "function" is defined in Funk & Wagnall's unabridged Dictionary of 1913 as

"An activity rightfully belonging to a person or thing; one's proper business, duty, part or office."

It is the contention of the Territory that the veterans' tax revenue collected as above set forth in the statement of facts clearly "permits" payment in accordance with the terms of the writ and that the mandatory language of Section 5 of Chapter 27 Session Laws of Alaska, 1946, establishes a clear duty upon the Board to cause issuance of the vouchers necessary

for repayment to the General Fund of the Territory. Said Section 5 follows with italics supplied for emphasis:

“APPROPRIATION. There is hereby appropriated the sum of three hundred fifty thousand dollars (\$350,000.00) for deposit in the Alaska World War II Veterans’ Revolving Fund to be used for the purpose of this Act, including expenses of administration; provided, however, that the Board *shall* pay back such sum to the Territorial Treasury *as soon as* revenues collected through the tax imposed by this Act *will permit*, but not later than four years after the effective date hereof.”

The word “shall” is amply defined in *Words and Phrases*, Vol. 39, as *mandatory*. See 1947 Cumulative pocket part of said volume, pages 17 and 18, from which we obtain the following:

“The word ‘shall’ is equivalent to the word ‘must’.”

Bateman v. Smith, Tenn., 194 S.W. 2d 336.

“The word ‘shall’ has a peremptory, imperative, compulsory, and mandatory sense as opposed to a permissive sense.”

Weill v. Centralia Service & Oil Co., 51 N.E. 2d 345, 347; 320 Ill. App. 397.

“‘Shall’ is the ordinary word used in connection with a mandate.”

City of Lebanon vs. Dale, 46 N.E. 2d 269, 272; 113 Ind. App. 173.

“The verb ‘shall’ in statute is ‘mandatory’ when public welfare requires that it be given such meaning.”

In re Fear, 26 A. 2nd 457, 459, 344 Pac. 624.

Appellants have contended in effect that the word “shall” is modified by the language, “but not later than four years after the effective date hereof.” Appellee, the Territory, points out that such words merely express a maximum period at the expiration of which payment must be made even if it took the last dollar out of the Veterans’ Fund, and the Territory contends that in consideration of the facts and general public welfare, the mandatory language of Section 5 has become presently effective and enforceable without awaiting expiration of the maximum period.

We now look at the meaning of the word “permit”. Synonyms given by Soule’s Dictionary of English Synonyms are as follows:

“Allow, let, suffer, tolerate, endure.”

Rewritten, the controlling words of Section 5 would be, “must pay back as soon as revenues will allow, let, suffer, tolerate or endure.”

Now counsel contends in appellants’ brief, P. 10, that the mandatory language of the section is meaningless because it did not specify that payment had to be made when any particular portion of the tax revenues had been collected or when a certain percentage of veterans’ applications have been acted upon. Coun-

sel also draws the same conclusion because the Act "does not say that the appropriation shall be paid back at any particular time." Counsel then argues that the Act "certainly leaves to the discretion of some person or some board or body to say when the revenues collected through the tax imposed will permit the repayment of the appropriation."

Appellee agrees that a demand for payment when only the first \$350,000.00 had been collected under the tax would have been premature as payment then would have stopped all functioning of the veterans' program. It was obviously the intent of the legislature that the program should be kept going, and it was apparent at the outset that the time would come when there would be a borderline stage unsusceptible to easy determination on the question of whether revenues derived from the tax would then "permit" of repayment. Only then would the discretion of the Board have been invokeable to ascertain its duty in the premises. However, demand was not made at such borderline stage. It was made at a time when more than 50% of the tax had been collected and the writ orders installment payments at calendar quarter intervals, the last of which will fall when nearly \$3,000,000.00 of the tax will have been collected. Furthermore, the case in the Court below was heard at a time when the Board had enough money on hand to pay the amount in full, although the demand was restricted to only a 50% immediate collection with the balance deferred for three months.

Compliance with the terms of the demand would have allowed uninterrupted continuance of the veterans' program even though somewhat curtailed. Therefore, the time had clearly arrived which is described in the Act thus: "... as soon as revenues collected through the tax imposed by this Act will permit . . . "; in other words, allow, let, suffer, or endure.

Therefore, at the time in question discretion was not needed, but only an unselfish observance of a clearly defined duty. The hypothetical question as to the need for discretion if the Territory had proceeded prematurely has nothing to do with the case. Quotations from the Act in appellants' brief on pages 12 and 13 thereof do not alter the effect of the mandatory words on the specific subject of repayment. Certainly the Board has power to "formulate general policies" on whether to run a strict banking loan program or a liberal loan program etc. and to adopt rules and regulations binding upon its executive officer, but it may not alter the law under which it operates through the guise of policy making. To hold otherwise would be to permit extremely uncooperative treatment of the Territory to the detriment of the general public by the very creature it created.

Of course, every administrative officer or board has to read the statute under which it operates to ascertain its powers, functions and duties and may perhaps invoke some elements of statutory construction. On this point we find in 34 *Am. Jur.* P. 913, Sec. 133, as follows:

“In many cases public officials may have to resort to statutes to ascertain the character and extent of their duties. That this may be necessary in a particular case does not necessarily deprive the duty of its ministerial character so as to prevent enforcement by mandamus. So, in applying the rule stated in the preceding section, that mandamus will issue to compel executive officers to perform their ministerial duties, the fact that the particular duty in question requires the interpretation of the law by the executive officer does not ordinarily prevent issuance of the writ”

The opposite has also been held, as shown by the last sentence of said section, but that text is supported by a very old case. It reads as follows:

“On the other hand, it has been held that mandamus will not issue to compel an executive officer to perform an act when the duty of performing it depends on the construction of a statute, and the officer has construed it as not requiring him to perform the act, although the court may be of the opinion that his construction of the statute is incorrect.”

The main text is supported by the case of *Miguel v. McCarl, Comptroller General et al*, 291 U.S. 442, decided by the Supreme Court on March 5, 1934. The Court holds that

“Where the duty to make a payment of public money is imposed so plainly by statute as to leave no play for judgment or discretion, the duty is purely ministerial and its performance may be compelled by mandamus or mandatory injunction.”

In said case the Court held that the duty pre-

scribed by statute was so clear as to warrant granting of relief even though the Comptroller General had previously construed the law to the opposite effect. This repudiates the older view that the Court will not interfere to enforce performance of a duty where administrative interpretation has been rendered even if wrong. In discussing the matter, the Court cited with approval the case of *Roberts v. United States*, 176 U. S. 221, and quotes the opinion in that case as follows:

“ ‘The opinion points out (p. 231) that every such statute to some extent requires construction by the officer; that he must read the law and, therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is required to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired.’ This view of the matter has been uniformly approved in subsequent decisions. See, for example, *Lane v. Hoglund*, 244 U. S. 174, 181; *Wilbur v. Krushnic*, 280 U. S. 306, 318.”

The propriety of considering the public interest in this case is established by reference to 113 *A. L. R.* 210, where numerous cases are cited. The general principle was stated by Mr. Justice Brandeis in *Duncan Townsite Co. v. Lane* (1917), 245 U.S. 308,

“Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief, or will be within the strict letter of the law, but in disregard of its spirit.”

SUMMARY

1. The Alaska mandamus statute is liberal in its terms and does not require that a duty be clothed with strict ministeriality in order to be enforceable by mandamus.

2. The duty of the Veterans' Board to make re-payment to the Territory in accordance with the writ issued by the Court below is clear.

3. Consideration of the public welfare emphasizes the mandatory nature of the words “shall pay back such sum to the territorial treasury as soon as revenues collected through the tax imposed by this Act will permit” The language “but not later than four years after the effective date hereof” simply fixes an outside limit without detracting from the full meaning of the mandatory words under the facts and circumstances.

4. The courts will enforce a duty which is clearly established even though an administrative officer has interpreted the statute in question in derogation thereof.

5. That the money derived and to be derived under the veterans' tax which is affected by the writ issued by the Court below constitutes the great bulk of all such money, easily "permitting" payment of the \$350,000.00 to the General Fund of the Territory.

Respectfully submitted,

RALPH J. RIVERS,
Attorney General of Alaska.
Attorney for Appellee.

No. 11757
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLE-
HEM STEEL CORPORATION, a corporation,

Appellees.

APOSTLES ON APPEAL

(In Two Volumes)

VOLUME I

(Pages 1 to 240, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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In the United States Circuit Court of Appeals
for the Ninth Circuit

TIDE WATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLE-
HEM STEEL COMPANY, a corporation,

Appellees.

UNITED STATES OF AMERICA, ss.
CITATION

To David Lawton Richardson, and to His Proctors,
Gaines Hon and Irving Feintech; to Bethlehem Steel
Company, a Corporation, and to Its Proctors, Messrs.
Lillick, Geary & McHose, Greeting:

You are hereby cited and admonished to be and appear
at a United States Circuit Court of Appeals for the
Ninth Circuit, to be held at the City of San Francisco,
in the State of California, on the 18th day of October,
A. D. 1947, pursuant to an order allowing appeal filed
on September 8th, 1947 in the Clerk's Office of the Dis-
trict Court of the United States, in and for the Southern
District of California, in that certain cause No. 4574 W,
Central Division, wherein Tide Water Associated Oil
Company, a corporation, is appellant and you are appellees
to show cause, if any there be, why the decree, order
or judgment in the said appeal mentioned, should not be

corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 8th day of September, A. D. 1947, and of the Independence of the United States, the one hundred and seventy-first year.

PAUL J. McCORMICK

U. S. District Judge for the Southern District of
California

Petition for Appeal, Order Allowing Appeal and Assignments of Error.

Service of a copy of the foregoing Citation is acknowledged this 10th day of September, 1947. Lillick, Geary & McHose, John C. McHose, Proctors for Respondent, Bethlehem Steel Company, a corp. Gaines Hon and Irving Feintech, Gaines Hon, M. R., Proctors for Libelant.

[Endorsed]: Filed Sep. 10, 1947. [2]

To the District Court of the United States
Southern District of California
Central Division

In Admiralty No. 4574 H

DAVID LAWTON RICHARDSON,

Libelant,

vs.

GH LBF COMPANY

BETHLEHEM STEEL CORPORATION, a corporation;
TIDE WATER ASSOCIATED OIL COMPANY, a corporation;
JOHN ONE; JOHN TWO;
JOHN THREE; JOHN FOUR; JOHN FIVE;
JOHN SIX,

Respondents.

LIBEL IN PERSONAM
(Damages—Personal Injuries)

The Libel and Complaint of David Lawton Richardson, Libelant, in a cause of damage for personal injuries, civil and maritime, alleges and propounds as follows:

ARTICLE FIRST.

GH LBF Company

That the Respondent, Bethlehem Steel Corporation, a corporation, is a corporation organized and existing under the laws of the State of Delaware, and is authorized to transact business in the State of California.

ARTICLE SECOND.

That the Respondent, Tide Water Associated Oil Company, a corporation, is a corporation organized and existing under the laws of the State of Delaware, and is

authorized to transact business in the State of California. [3]

ARTICLE THIRD.

Libelant is ignorant of the true names or capacities, whether individual, associate, corporate or otherwise of the Respondents, John Two, John Three and John Four and therefore sues said Respondents and each of them by such fictitious names and prays that their true names and capacities when ascertained may be incorporated herein by appropriate amendment.

ARTICLE FOURTH.

That the Respondents, John One, John Five and John Six, are sued herein under fictitious names for the reason that their true names at this time are not known to Libelant and when Libelant ascertains their true names, he will ask leave of Court to insert their true and correct names in the place and stead of said fictitious names.

ARTICLE FIFTH.

That at all times herein mentioned, the Respondent John One, was the agent, servant and/or employee of his co-Respondents, and at the time of the happening of the accident was acting within the course and scope of his employment and/or agency; said Respondent, John One, at the time and place referred to in this Libel was charged with the duty of permitting members of the Coast Guard to board the S. S. Frank G. Drum for the purpose of making inspections of said ship.

ARTICLE SIXTH.

That at all times herein mentioned the Respondent, John Five, was the agent, servant and/or employee of his co-Respondents and at all times herein mentioned was acting within the course and scope of his employment and/or agency and that at said time and place said Respondent was in charge of that certain ship which was then and there known and referred to as "S. S. Frank G. Drum, hereinafter mentioned. [4]

ARTICLE SEVENTH.

That at all times herein mentioned the Respondent, John Six, was the agent, servant and/or employee of his co-Respondents, and at the time of the happening of the accident hereinafter mentioned was acting within the course and scope of his employment and/or agency.

ARTICLE EIGHTH.

That at all times herein mentioned the Respondent, Tide Water Associated Oil Company, a corporation, and John Four were the owners and operators of that certain ship above referred to, to-wit: "SS Frank G. Drum", and at the time of the happening of the accident hereinafter mentioned, said ship was on navigable waters of the United States of America, to-wit: at the repair docks

GH LBF Company

of the Respondents, Bethlehem Steel ~~Corporation~~, a corporation, and John Two and John Three, Terminal Island, Harbor of Los Angeles, State of California; Libelant is informed and believed and upon such information and belief alleges that said ship was so docked at said place and time for the purpose of undergoing repairs

by the said Respondents, Bethlehem Steel Corporation, a corporation, and John Two and John Three.

ARTICLE NINTH.

That at all times herein mentioned the Libelant was and still is a member of the United States Coast Guard acting in the capacity of Seaman First Class.

ARTICLE TENTH.

That on the 6th day of August, 1944, Libelant was attached to Company A, C. O. T. P. Guard Battalion, Terminal Island, California; on said date the Libelant was in charge of a detail of guards in connection with patrolling, among other things, docks of Bethlehem Steel

Company GH LBF

~~Corporation~~, a corporation, John Two and John Three and ships located on navigable waters of the United States of [5] America, at said docks of the Bethlehem Steel

Company GH LBF

~~Corporation~~, a corporation, John Two and John Three, Terminal Island, Harbor of Los Angeles, State of California; Libelant's duties at said time and place as a member of the United States Coast Guard were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and

GH LBF Company

ships at said Bethlehem Steel ~~Corporation~~, a corporation, John Two and John Three; that at said time and place the Respondents knew or in the exercise of ordinary care should have known all of the duties of Libelant as above set forth.

ARTICLE ELEVENTH.

That at about the hour of 9:10 o'clock P. M. on August 6, 1944, Libelant entered said ship, S. S. Frank G. Drum, in his official capacity and in line with his duties, for the purpose of, among other things, inspecting said ship for the benefit of the Respondents herein.

ARTICLE TWELFTH.

That at said time and place the Respondents knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained said S. S. Frank G. Drum and the repair docks where said boat was docked and further knowingly, negligently, carelessly, recklessly and unlawfully caused, maintained and permitted the hatch to the bunker of said ship to remain open and unguarded and in a dark condition without any illumination whatever to warn people on said ship that said hatch was in said condition, all of which was well known to the Respondents and each of them. Libelant further alleges that the accident herein complained of was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of Respondents and charges that said Respondents are liable for the damages herein claimed because said [6] Respondents are at fault in the following, among other particulars, viz:

(a) At all times herein mentioned, the hatch to the bunker tank of said ship, which was approximately thirty-five (35) feet in depth, remained open and unguarded.

(b) At all times herein mentioned the hatch to the bunker tank of said ship was and remained in a dark condition without any illumination whatever.

(c) There were no illuminating signs or signs whatever to warn people on or about said ship that said hatch was open and unguarded.

(d) There were no precautions taken by Respondents or any of them, to warn or let people on or about said ship know that said hatch was open and unguarded.

(e) Respondents failed and neglected to have any person at or near said unguarded hatch to inform people at or near said hatch that the same was open and unguarded.

(f) That the Respondents permitted said hatch to remain open, unguarded and in a dark condition, all of which constituted a trap for people on said ship at or near said hatch.

(g) Respondents knew that said ship would be inspected by a member of the United States Coast Guards and notwithstanding such knowledge permitted said hatch to remain unguarded and in a dark condition. [7]

There is negligence in other respects as will be shown upon the trial.

ARTICLE THIRTEENTH.

Notwithstanding the knowledge and existence of the dangerous condition of the ship and the hatch thereon above referred to, the Respondents invited and permitted Libelant onto said ship for the purpose of making the inspection above referred to and the Libelant, while making said inspection and due to the negligence, carelessness, recklessness and unlawfulness of the Respondents as here-

in alleged, did fall into said open hatch and was precipitated a distance of approximately thirty-five (35) feet to the bottom of said tank thereby damaging and injuring said Libelant as hereinafter set forth.

ARTICLE FOURTEENTH.

That as a result of the negligence of the Respondents as alleged, Libelant was hurt in his health, strength and activity, received a profound shock to his nervous system and was made sick, sore and lame and more particularly Libelant was hurt about his head, limbs and body and did receive a severe fracture to the right femur; from said injuries Libelant has suffered great physical pain and mental anguish and is informed and believes and upon such information and belief alleges that his injuries are permanent and that he will suffer for a long time in the future, all to his damage in the sum of \$45,000.00.

ARTICLE FIFTEENTH.

That as a result of the negligence of the Respondents as alleged, Libelant was confined to the United States Naval Hospital in Long Beach from August 6, 1944, to and including January 5th, 1945, and on that date was transferred to the Naval Convalescent Hospital, San Bernardino, California, where he is now convalescing; that Libelant, in order to walk, was compelled to use crutches up to and including June 4, 1945, and since said time is compelled to [8] use a walking stick at intervals.

ARTICLE SIXTEENTH.

That as a result of the negligence of the Respondents as alleged it was necessary for Libelant's right leg to be in four different plaster-of-paris casts from August 8,

1944 to and including April 30, 1945 and as a result of the negligence of said Respondents, it was necessary that a stainless steel plate approximately seven and one-half inches in length be fastened to the bone at the fracture site of the right femur in order to keep said bone in place and Libelant is informed and believes and upon such information and belief alleges that it will be necessary that said steel plate remain fastened to said femur bone for the remainder of Libelant's natural life.

ARTICLE SEVENTEENTH.

Libelant is informed and believes and upon such information and belief alleges that he will never be physically able, on account of said injuries, to follow his regular duties as a member of the United States Coast Guard and as a result of the said injuries will in the near future be discharged from the said United States Coast Guard and forced to seek a gainful occupation in civilian life; Libelant is informed and believes and upon such information and belief alleges that his injuries will greatly hamper him from competing on the open labor market for gainful employment, all to his further damage in the sum of \$25,000.00.

ARTICLE EIGHTEENTH.

Libelant is informed and believes and upon such information and belief alleges that S. S. Frank G. Drum is now and will be during the pendency of this libel within the district and jurisdiction of this Court. [9]

ARTICLE NINETEENTH.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this honorable Court.

ARTICLE TWENTIETH.

That at all times herein mentioned the Respondents,
GH LBF Company
Bethlehem Steel ~~Corporation~~, a corporation, and Tide
Water Associated Oil Company, a corporation, were and
still are transacting business in the State of California
and particularly were and still are transacting business
within the jurisdiction of this honorable Court.

Wherefore your Libelant prays that this Court cause to be issued a Monition requiring Respondents to appear and answer, all and singular, the matters aforesaid, that the Court will be pleased to pronounce for the damage aforesaid with interest and costs and will give the Libelant such other and further relief as in law and justice he is entitled to receive.

IRVING FEINTECH
315 West Ninth St.
Los Angeles, Calif.

GAINES HON
By Irving Feintech
315 West Ninth St.
Los Angeles, California
Attorneys for Libelant [10]

[Verified.]

[Endorsed]: Filed Oct. 16, 1945. [11]

[Title of District Court and Cause]

RESPONDENT TIDE WATER ASSOCIATED OIL
COMPANY, A CORPORATION'S EXCEP-
TIONS TO LIBEL IN PERSONAM

Comes now the respondent, Tide Water Associated Oil Company, a corporation, and excepts to the libel herein as follows:

I.

Excepts to the sufficiency of the said libel upon the ground that it fails to allege any facts showing that the relationship of invitor and invitee existed between said respondent and the libellant.

II.

Excepts to the sufficiency of the said libel upon the ground that as a matter of law the facts alleged show at most that the libellant boarded the SS "Frank G. Drum" under a commission to board given by law and there are no facts alleged showing a breach of any duty which may have been owed by this respondent to the libellant under said circumstances. [12]

III.

Excepts to the lack of distinctness in the allegations of the Fifth Article in that it is impossible for the respondent to ascertain from said allegations whether John One was a licensed officer of the SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum."

IV.

Excepts to the allegations of the Sixth Article upon the ground that they lack distinctness with reference to John Five in that it is impossible to ascertain therefrom

whether John Five was a licensed officer of the said SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum"; and also upon the ground that it cannot be ascertained from said allegations how John Five could be the agent, servant and/or employee of all of his co-respondents, said libel also alleging in the Fifth Article that the respondent John One was the agent, servant and/or employee of his co-respondents, including John Five, referred to in the Sixth Article.

V.

Excepts to the allegations of the Fifth, Sixth and Seventh Articles upon the ground that they lack distinctness in that in the Fifth Article John One is alleged to be the agent, servant and/or employee of his co-respondents; and in the Sixth Article John Five is alleged to be the servant, agent and/or employee of his co-respondents; and in the Seventh Article John Six is alleged to be the agent, servant and/or employee of his co-respondents; and it cannot be ascertained from the said pleading how each one of these respondents sued by fictitious names, to wit, John One, John Five and John Six could, at one and the same time, be the employees of each other and the servants and employees of each other. [13]

VI.

Excepts to the Seventh Article in that the allegations lack distinctness with reference to the respondent John Six and it cannot be ascertained therefrom whether John Six was a licensed officer of the SS "Frank G. Drum" or a member of the crew of the SS "Frank G. Drum."

VII.

Excepts to the allegations of the Tenth Article upon the ground that they lack distinctness with reference to the libellant's alleged duties in that it cannot be ascertained what is meant by the allegation that the libellant's duties "were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and ships at said Bethlehem Steel Corporation, a corporation; there being no allegation in the libel that any guards were on duty aboard said vessel.

VIII.

Excepts to the relevancy and competency of the allegation in the Eleventh Article that the libellant entered said ship "for the purpose of, among other things, inspecting said ship for the benefit of the respondents herein," in that said allegation is a conclusion.

IX.

Excepts to the relevancy and competency of the allegation in the Twelfth Article that the respondents "knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained . . . the repair docks where said boat was docked," for the reason that there is no allegation of any fact showing a proximate causal connection between any act or omission with reference to the repair docks and any injury sustained by the libellant. [14]

X.

Excepts to the relevancy and competency of the allegation in the Twelfth Article "that the accident herein complained of was entirely due to the manifest incompetency,

fault, negligence, carelessness and unlawfulness of respondents," upon the ground that said allegation is a conclusion.

XI.

Excepts to the language in the Twelfth Article "among other particulars" with reference to alleged fault, upon the ground that said language is not sufficient to charge any specific negligent act on the part of the respondent and general Admiralty Rule 22 requires the libellant to propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit.

XII.

Excepts to the relevancy and competency of the recital in subdivision (f) of the Twelfth Article—"all of which constituted a trap for people on said ship at or near said hatch," in that said recital is a conclusion.

XIII.

Excepts to the last allegation in the Twelfth Article, to wit, "There is negligence in other respects as will be shown upon the trial," upon the ground that said allegation lacks sufficiency and distinctness.

Wherefore, respondent prays that its exceptions be sustained and that if the libel is not amended within such time as this Court shall allow, if at all, said libel may be dismissed.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation [15]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EXCEPTIONS TO LIBEL

I.

Libellant, as a matter of law, is not an invitee.

Title 14 USCA, Sec. 45, provides that "commissioned, warrant and petty officers of the Coast Guard are empowered to make inquiries, examinations, inspections, searches, seizures and arrests upon the navigable waters of the United States for the prevention, detection and suppression of violation of laws of the United States. For such purpose, such officers are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance. . . ."

The libel alleges that the SS "Frank G. Drum" was on navigable waters of the United States; that the libellant on the 6th day of August, 1944, was in charge of a detail of guards; that he boarded said vessel in his official capacity and in line with his duties. Under such circumstances it cannot be logically contended that the libellant was an invitee. The respondent had no possible right to refuse to permit the libellant to board the vessel. If it had refused to permit him to board the vessel he was authorized to use all necessary force to compel compliance. An invitation does not exist unless the alleged invitor has lawful power to permit or refuse to permit another person to enter upon real or personal property. How can it be contended that the libellant could have used physical force to accomplish his duty as a member of the armed forces

of the United States in time of war in boarding the said vessel and at the same time say that the respondent invited him to come aboard the vessel? [16]

The only object for which the libellant could have boarded the vessel in the course of his duty as a member of the armed forces of the United States would be to prevent, detect and suppress violations of statutes of the United States. In other words, he comes within a group of persons who are in the same category as firemen and policemen.

“It has been held that a policeman or constable entering private premises in the performance of his duty is a mere licensee to whom the owner owes no common law duty to keep the premises safe, although the owner may be liable for an injury resulting from his neglect of a statutory duty with respect to the condition of the premises.”

45 Corpus Juris, 794, sec. 199.

“A member of a public fire department who enters a building in the exercise of his duties is a mere licensee under permission to enter given by law, and the owner or occupant of the building does not owe to such person any duty to keep the premises in a safe condition.”

45 Corpus Juris, 794, sec. 200.

In the libel there is no allegation of any fact showing any neglect of any statutory duty with respect to the condition of the SS “Frank G. Drum.”

“In the majority of jurisdictions the rule is well settled that, in the absence of a statute or municipal ordinance, a member of a public fire department,

who, in an emergency, enters on premises in the discharge of his duty, is a mere licensee, [17] under a commission to enter given by law, to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury.” (Emphasis added).

13 A. L. R. 638.

Please see also:

141 A. L. R. 584, supplementing the annotation in
13 A. L. R. 637-638.

There is no allegation in the libel of any overt act on the part of the respondent.

Assuming, for the sole purpose of argument, (in spite of the authorities hereinabove cited) that the libellant could have been an invitee of the respondent aboard said vessel, there is no allegation of any fact showing that he was invited to be in the particular part of the vessel where he sustained his injury. It is an elementary principle that a person may be an invitee in one part of premises and a trespasser or licensee in other parts. For instance, a passenger on an ocean-going liner is an invitee while using those parts of the vessel set aside for the accommodation or amusement of passengers. On the other hand, if a passenger, out of curiosity, roams around the engine room, even with the consent of the licensed officers in charge thereof, he would be a licensee. If he did the same act without the consent of the licensed officers, he would be a trespasser. Therefore, if it is legally possible for the libellant to have been an invitee of the respondent, he should allege facts showing that he was at the place of the accident as an invitee of the respondent.

The libellant fails to allege that he was using any passageway which was designed for the purpose of affording access from or to any part of the vessel. [18]

II.

“A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner’s business thereon. Accordingly the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property is not liable for injuries to licensees due to the condition of the property, or, as it has been expressed, due to passive negligence or acts of omission. A fortiori, if licensees choose to make use of property although there is open and obvious danger thereon, the owner cannot be held liable for injury to a

licensee because of such danger. It has been said, however, that the owner is under a duty not to expose a licensee to perils which [19] could be avoided by the exercise of reasonable care. The owner has been held not liable for injuries which a mere licensee on his property has received from excavations, a trench, a ditch, a cistern, a hole in the ground, an uncovered coalhole, a steam pit, a drain used to carry away hot water, a vat of hot water, elevators, unguarded or insufficiently guarded elevator shafts, floor openings, a hole in a bridge, an opening in the platform of a fire escape, uninsulated or insufficiently insulated electric wires, stairways, scantlings or pieces of timber on the floor of a hall of an office building, lack of light in a tenement house hallway, a pile of lumber, a heap of stones, a derrick, a moving crane, log rollways, a defective farm crossing over a railroad, a defect in the roof of a barn, a wire stretched across the outer edge of a lawn to keep off trespassers, a barbed wire fence along the boundary of the premises, the fall of a gravestone in a cemetery, a fire on the premises, an explosion of gas, the breaking of a machinery belt, or failure of a servant of the owner to use reasonable care in throwing a bale of hay from a loft."

45 Corpus Juris, 798-802, sec. 203.

Disregarding, for the moment, the many adjectives used by the libellant in qualifying the alleged acts which resulted in his injury, it is clear that the physical cause of the injury was an open hatch in some part of the vessel. The reason, as stated by the libellant, for his

fall into the open hatch was that said open hatch was not illuminated so that the libellant could see said open hatch.

The libellant alleges that the vessel was docked at the time and place, for the purpose of undergoing repairs by the respondent [20] *Bethlehem Steel Corporation* (Libel, page 3, Eighth Article). He therefore had knowledge of the fact that he could not reasonably expect the vessel to be in the same condition throughout as might be the case if the same had not been withdrawn from navigation.

If, as is contended by the respondent, the libellant was at most a licensee, he must allege facts showing that the respondent committed some overt act after the libellant boarded the vessel as such licensee and that such overt act proximately caused his injury. There was no affirmative duty on the part of the respondent to perform any act such as lighting the area around the hatch. Respondent's only duty was to refrain from committing an overt act of negligence after the libellant came aboard. A licensor is entitled, under the law, to remain passive and has no affirmative duty. There is no allegation of any fact in the libel showing that the libellant notified any responsible agent of the respondent that he intended to go to the particular part of the vessel where the open hatch would be encountered. Libellant does not even allege that any agent or employee of respondent was aboard the SS "Frank G. Drum" at the time the libellant went aboard. All he says is that John One was charged with

the duty of permitting members of the Coast Guard to Board the SS "Frank G. Drum" for the purpose of making inspections of said ship and that John Five "was in charge of that certain ship which was then and there known and referred to as SS 'Frank G. Drum' hereinafter mentioned."

Respondent has already shown (14 USCA, sec. 45) that there wasn't anything the respondent could have done about keeping the libellant off of the vessel. The mere fact that John Five was in charge of the vessel does not mean that John Five was on the vessel.

Although the libellant alleges that the Tide Water Associated Oil Company was the owner and operator of the SS "Frank G. Drum" at the time of the happening of the accident this is a legal (21) impossibility. Pursuant to Executive Order No. 9054, 7 Fed. Reg. 837, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327, there was established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration under the direction of an Administrator appointed by and responsible to the President. The Executive Order provides in part as follows:

"The Administrator shall perform the following functions and duties: a. Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2)

vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.”

Title 50 USCA App. sec. 1295.

III.

With reference to Exceptions No. III, IV, V and VI:

The respondent contends that it is at least entitled to know the capacity in which the respondents John One, John Five and John Six were serving as agents or servants or employees. Unless the libellant is compelled to give some clue to the scope of the employment of these fictitious persons and what their duties were by alleging facts clearly showing the relationship which the libellant claims each one of these fictitious persons bore to the respondent, then it will be impossible for the respondent to prepare an answer in accordance with the requirements of general Rule 26 which states that “all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, . . .” [22]

The libellant has stated his contentions with reference to John One, John Five and John Six in such a confused manner as to make it impossible to determine the identity of any one of such fictitious persons. If the libellant would allege that John One was the master of the SS “Frank G. Drum” or some other officer of said vessel or a bos’n or able bodied seaman, respondent would have some information upon which to predicate an answer. The

Court will take judicial notice of the fact that it is possible for the libellant to obtain exact information with reference to the name, address and capacity of each person who might have been on board the vessel at the time and place referred to in the libel. Libellant can obtain a copy of the Shipping Articles.

More confusion arises because of the allegations that John One was an agent, servant and employee of John Five and John Six; that John Five was an agent, servant and employee of John One and John Six; and that John Six was an agent, servant and employee of John One and John Five.

IV.

In the Tenth Article the libellant refers to checking upon guards on duty but he doesn't allege that there were any guards of any kind on board the SS "Frank G. Drum" at the time he boarded the vessel. If there were no guards on duty aboard said vessel then obviously the libellant would not be required to go aboard for the purpose of checking on any guards. His allegation that it was also his duty to make further checks on docks to verify the reports of the Coast Guardsmen on duty means nothing unless he alleges that some Coast Guardsman on duty on said vessel made some report which required the presence of the libellant. In the final analysis, it is quite clear from the law governing the Coast Guard (Title 14 USCA sec. 45) the only duty of the libellant would be to inspect the vessel for the purpose of finding out

whether there had been any [23] violation of any law of the United States.

V.

The allegation in the Eleventh Article that the libellant entered the ship for the purpose of inspecting said ship "for the benefit of the respondents herein" is a conclusion.

If any inspection made by the libellant was for the benefit of this excepting respondent, the facts should be alleged so that the Court could draw the conclusion that the inspection was for the benefit of the respondent. If we look at the allegations in the other Articles of the libel we find that libellant claims that he was checking upon guards and verifying the reports of the Coast Guardsmen on duty. These allegations show no benefit to the respondent in the sense that the benefit was one which would create the relationship of invitor and invitee.

If a fireman comes into your house to put out a fire his entry is for the benefit of the owner of the premises and also for the benefit of the neighboring houses but it is not the kind of benefit which is referred to as one of the elements which makes up the relationship of invitor and invitee. Preventing spies and saboteurs from damaging the vessel would, of course, benefit the owner of the vessel, but the obvious purpose of the activities of the libellant was to safeguard the interests of a nation at war. As a matter of law it would be impossible for a member of the armed forces of the United States to be assigned to the duty of protecting private property for

the benefit of the owner of such property. The services of the armed forces are never used for the purpose of policing private property for the benefit of the individual owner.

V.

The allegation in the Twelfth Article with reference to the activity of the respondent in so far as the repair docks are [24] concerned has no place in the libel for the reason that there is lack of any showing of proximate causal connection between anything done or omitted on the repair docks and the act of the libellant in falling into an open hatch.

Admiralty Rules of pleading require specific allegations of negligence. The libellant is evidently proceeding on the theory that the rules of pleading adopted by the State of California are applicable in Admiralty. There is no question about the fact that negligence cannot be pleaded generally in admiralty. Aside from this observation, the allegation with reference to the contention that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondents is not even a general allegation of negligence. It is an attempt to plead proximate causal connection but the rules require an allegation of fact showing a proximate causal connection between a specific negligent act and the injury. Therefore, this particular language on lines 29 to 31, page 4 of the libel, is a conclusion and therefore irrelevant and incompetent.

The language "among other particulars", line 1, page 5 of the libel, is irrelevant and incompetent for the reason that it alleges no specific act of negligence. It is also lacking in distinctness. The respondents are entitled to know before the day of trial and the introduction of evidence what the libellant claims as the basis of his suit.

The same defect exists with reference to the allegation in line 1, page 6 of the libel, that "there is negligence in other respects as will be shown upon the trial."

The only fact alleged in subdivision (f) of the Twelfth Article is that the respondents "permitted said hatch to remain open, unguarded and in a dark condition". If an open unguarded hatch, not illuminated, is a trap, then the Court can draw that conclusion itself. The libellant cannot, by a conclusion, establish [25] that an open unguarded and unilluminated hatch is a trap. A trap is something which is set for the purpose of injuring another. There is no allegation in the libel to the effect that the respondent opened the hatch and left it open for the purpose of causing the libellant to fall into it.

Respectfully submitted,

LASHER B. GALLAGHER

Proctor for Respondent, Tide Water Associated
Oil Company, a corporation [26]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 19, 1945. [27]

[Title of District Court and Cause]

ANSWER OF LIBELLANT TO EXCEPTIONS TO
LIBEL IN PERSONAM OF RESPONDENTS,
TIDE WATER ASSOCIATED OIL COMPANY,
A CORPORATION, AND BETHLEHEM STEEL
CORPORATION, A CORPORATION

I.

Insofar as Respondents' argument concerning fictitious defendants is concerned, Libellant feels that they are sufficiently described in the Libel and sufficiency identified and submits that point for the consideration of the Court without further argument.

II.

Insofar as the allegations of negligence are concerned, the Court's attention is respectfully called to pages 4, 5, and 6 of the Libel, and particularly to page 5 where seven specific acts of negligence are set forth in detail. In this respect Libellant desires to call the Court's attention to the case of *Jolivel vs. City of Seattle*, D. C. Wash. 1915, 226 F. 963 which holds that a Libel alleging with reasonable certainty the essential facts showing a legal duty, a default therein, and a resultant injury of which it is the proximate cause is sufficient. [28]

In fact the cases have gone so far as to hold that there is no rigid rule which prevents Libellant alleging one fault recovering on proof of a different fault. Libellant may rely upon improper speed in fog shown by defendant's evidence, although he alleged only improper steering. The *Cambridge*, D. C. Mass. 1871, Fed. case No. 2334. Complaint was made of the fact that Libellant in his Libel stated "There is negligence in other respects as will be

shown upon the trial.” The Court is well aware of the rule that a Libellant may amend to conform to proof and this allegation was placed in the Libel to preserve his rights in the event it became necessary to amend the Libel at the time of trial to conform to proof.

Libellant contends that the Respondents have been specifically and fully informed of the acts of negligence and that the Libel is sufficient in this respect.

III.

Apparently the main basis of the exceptions of both Respondents is the contention that Libellant was a licensee and not an invitee. In support of their contention in this respect, they quoted at length from Corpus Juris and cite ~~the said~~ cases involving policemen and firemen who had responded to an emergency call and accordingly were held to be mere licensees. Such is not the situation in the case at bar. In fact some jurisdictions have held that firemen are invitees. In this respect the Court’s attention is called to 38 Am. Jur. Page 785, paragraph 125 which states in part as follows:

“According to some authority, an owner of property is under obligation to make his premises reasonably safe for a fireman coming thereon in the discharge of his duty, and can be held liable for an injury sustained by a fireman as a result of some defect in the premises which could have been remedied in the exercise of reasonable [29] care . . .” *Meiers v. Fred Koch Brewery*, 229 NY 10, 127 NE 491, 13 ALR 633.

Other jurisdictions hold that policemen and firemen coming on premises in line of their duties as such act in

an emergency and therefore are mere licensees and not invitees. The question of whether one acted in an emergency or not seems to be the distinguishing factor where they hold policemen and firemen are licensees.

The rule seems to be set forth quite clearly in 38 Am. Jur. Page 784 at paragraph 123:

“Sec. 123. Public Officers—The decisions appear to be somewhat indefinite with respect to the status of public officers who enter upon premises in the discharge of duties imposed upon them by law. Some cases seem to warrant the statement that they are to be deemed, so far as the liability of the owner or occupant for negligence is concerned, not trespassers or licensees, but persons rightfully on the property. On the other hand, it has been asserted that at common law the occupier of premises is not under a duty of active diligence to protect from harm a person who enters on the premises under a license given by the law. It seems probable that no very general principle can be formulated, the cases being governed largely by their facts and surroundings. A distinction suggests itself, however, between officers who go upon property in the regular course of the business conducted thereon, whose presence may be deemed to be contemplated and known to the owner or occupant, and those public officers who enter not under any prearranged scheme, but as the result of extraordinary and unforeseen circumstances. Officials [30] of the former class may be deemed to come on the premises by invitation, whereas those of the latter description properly may be considered no more than licensees. At any rate, officers performing prescribed

and regular duties which require them to visit premises at regular intervals, such as engineers and inspectors, have been held to enjoy the status of persons entering by invitation." . . .

In this respect the Court's attention is called to Article Tenth, page 4 of the Libel, and particularly the last portion thereof, and also Article Twelfth, page 5, paragraph (g) thereof.

There are numerous cases involving this very point in California. The case of *Wilson vs. Union Iron Works*, 167 Cal. 539 was a case where a United States Inspector of Customs on the morning of the accident had a duty to board the steamer "Mongolia" at Pier 44 and stay on board the ship until it reached defendant's drydock. When the gangplank was made fast it was his further duty to go down first and allow no one to precede him so that other custom officers who were waiting for his arrival at the foot of the plank could go aboard the ship and immediately search the passengers for dutiable articles before anyone left the ship. While descending the plank it broke due to a defect. Under this set of facts the defendant claimed that plaintiff was merely a licensee at most and owed him only that duty which was owing to a licensee.

The Court held "Under these circumstances it is clear that the defendant owed to all persons lawfully and properly on board such vessel on arrival at the dock and there wishing to leave it, the duty of providing a safe and sound gangplank for their use."

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"It was, at all events, bound to exercise reasonable and ordinary care for the safe carriage of those

whom it had reason [31] to expect would avail themselves of that means of leaving the vessel."

"The plaintiff stood in a relation to the defendant which made this duty owing to him. He was aboard the vessel and left it over this gangplank in the performance of his duty, a duty which was usually performed by custom house officers in such cases and of which it is to be inferred the defendant had notice."

In the case of "The City of Naples," *Gilchrist et al vs. Naples*, 69 Fed. Rep. 794, the Libellant was a grain inspector and while in discharge of his official duty of inspecting the vessel preparatory to shipping a cargo of grain, he fell down a dark and unguarded hatchway. He testified he was following the direction pointed out to him by the captain; he testified that the lower deck was lighted only by two candles which were at a considerable distance from the hatchway into which he fell and which was invisible in the dark. The Court held "The Libellant was not on the vessel as a mere licensee. He was there in the discharge of an official duty in which the vessel itself had an interest for it could not receive its cargo until it had been inspected. The right and duty of the Libellant to inspect the vessel did not authorize him to take command of her or to give orders to her crew to prepare her for inspection or to light up the vessel for that purpose."

The case of *Law vs. Grand Trunk Ry. Co.*, 72 Maine 313, held that the owner of a wharf where foreign laden vessels discharge, are liable to custom officers who are required to visit the premises in the performance of their duties for personal injuries received while in the exercise of due care because of the unsafe or unsuitable condition of the wharf. It further held that a custom officer whose

duty is to watch for smugglers and prevent smuggling may be in the exercise of due care when in the course of his duty he passes over a wharf where a foreign laden vessel is lying in the night time and without a lantern.

In the case of *Tobin vs. P. S. & P. R. Co.*, 59 Maine 183, it [32] was held that a railway corporation is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in their platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving their platform in an unsafe condition.

The Court's attention is specifically called to the case of *Christy v. Ulrich et al*, 113 Cal. App. 138; 298 Pac. Rep. page 135. This was a case where the plaintiff was acting under the employment of the State of California as a resident engineer in charge of the construction of a state highway bridge. The bridge was being constructed under contract by the defendant, Ulrich. The duties of the plaintiff were to inspect the work under construction. Plaintiff was watching the progress of the workmen in pouring and tamping concrete. The tamper happened to break and one of the workmen said there was another tamper on a cross-runway at "Bent 2."

Plaintiff volunteered to get this tamper for the workmen. He walked along the main runway to the cross-runway at "bent 2," picked up the tamper and returned to the main runway, where one of the planks upon which he stepped gave way and precipitated him into the creek bed causing the injuries complained of.

The defendants insisted the plaintiff was a mere licensee to whom they owed no duty except to abstain from willful

and wanton negligence. In this respect the Court stated as follows:

“The respondent was not a mere licensee. The work was being performed upon a public highway right of way; the respondent was a state employee assigned to the highway division of the state department of public works; his duties, at the time of the accident, were to inspect the work under construction; and, for this purpose, it was necessary for him to go upon the scaffolding and other portions of the work as it progressed. Immediately preceding [33] the accident, he was inspecting the pouring of concrete in “Bent No. 3.” He saw that the tamper was broken and that the tamping of the concrete was not being done properly. He volunteered to get the workmen another tamper, and was injured while returning with that implement. In this he may have been acting outside the scope of his employment, but it must be remembered that he is not suing his employer in this action for injuries caused during the course of employment. He is resting his case on the negligence of the contractor. It is conceded that it was his duty to inspect all portions of the work, and the fact that he was voluntarily carrying a tool to the workmen while passing over the main runway does not alter his status as an invitee.”

The Court further stated “He was not on that runway upon any private business of his own or from mere curiosity or in violation of orders of spections. He was there because his duties required him to be there. The fact that at the moment of the accident he was carrying a tool to the workmen does not change the status because this was in aid of the duties he had to perform.”

Certainly the foregoing cases are analogous to the case at bar and they show conclusively that Libellant at the time of his accident was not a mere licensee but was an invitee and as such the respondent owed him at least ordinary care.

One of the Respondents raises in its exceptions Executive Order No. 9054, 7 Fed. Reg. 837 as amended by Executive Order No. 9244, 7 Fed. Reg. 7327. Certainly if there is anything to Respondent's point in this connection, it would at most be a special defense to be pleaded in its answer and not be raised by way of exceptions. In fact the evidence in this case will show that at the time of the accident, to-wit: August 6, 1944, Tide Water Associated Oil Company, a corporation, was the owner and operator of [34] the said vessel "SS Frank G. Drum" and that the War Shipping Administration did not take over the operations of said vessel until sometime subsequent to the happening of the accident.

Wherefore Libellant prays that the exceptions of both Respondents be disallowed and that they be directed to answer Libellant's Libel forthwith.

Respectfully submitted,

GAINES HON and
IRVING FEINTECH

By Gaines Hon

Proctors for Libellant [35]

Received copy of the within Answer of Libellant to Exceptions, etc., this 12th day of December, 1945. Lasher B. Gallagher for Resp. Asso. Oil Co.

Received copy of the within Answer of Libellant to Exceptions this 12th day of December, 1945. Lillick, Geary, McHose & Adams for Resp. Bethlehem Steel Co.

[Endorsed]: Filed Dec. 12, 1945. [36]

[Minutes: Monday, December 24, 1945]

Present: The Honorable Harry A. Hollzer, District Judge.

This cause coming on for hearing on exceptions to the libel;

It is ordered that the said matter stand submitted on the briefs heretofore filed. [37]

[Minutes: Wednesday, March 13, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

Good cause appearing therefor, it is ordered that the submission of the Exceptions of Respondent Tide Water Associated Oil Co. to the Libel, and the Exceptions of Respondent Bethlehem Steel Company (sued as Bethlehem Steel Corporation), to the Libel, be and hereby is vacated; and it is further ordered that this cause is placed on the calendar for hearing said Exceptions on Tuesday, March 19, 1946, at 10 A. M., before the Honorable Charles C. Cavanah. [38]

[Minutes: Tuesday, March 19, 1946]

Present: The Honorable Charles C. Cavanah, District Judge.

This cause coming on for hearing (1) Exceptions of Respondent Tide Water Associated Oil Co. to Libel, filed Nov. 19, 1945; (2) Exceptions of Respondent Bethlehem Steel Company (sued as Bethlehem Steel Corporation) to Libel, filed November 30, 1945; Irving Feintech and Gaines Hon, Esqs., appearing as proctors for the libelant; Lasher B. Gallagher, Esq., appearing as proctor for the respondent Tide Water Associated Oil Co.; and Messrs. Lillick, Geary, McHose, and Adams, by John C. McHose, Esq., appearing as counsel for the respondent Bethlehem Steel Co.:

Attorney Gallagher argues in behalf of respondent Tide Water Associated Oil Co.; Attorney McHose argues in behalf of respondent Bethlehem Steel Co.; Attorney Hon argues in behalf of the libelant; and Attorney Gallagher argues in reply. The Court makes a statement of its views and it is ordered that the exceptions to the libel be overruled as to both respondents, and it is further ordered that respondents are allowed twenty days to file answer to the libel.

Exception to the Court's ruling is taken by both respondents and allowed by the Court. Notice of ruling is waived. [39]

[Title of District Court and Cause]

ANSWER OF RESPONDENT BETHLEHEM
STEEL COMPANY, A CORPORATION

Comes now Bethlehem Steel Company, a corporation of the State of Pennsylvania, sued herein as Bethlehem Steel Corporation, a corporation, and answering the libel and complaint herein admits, denies, and alleges as follows:

I.

Answering Article First, admits that Bethlehem Steel Corporation, a corporation, is a corporation organized JCMc LBF Pennsylvania and existing under the laws of the State of Delaware, but denies that Bethlehem Steel Corporation is authorized to, or does, transact business in the State of California. Alleges that Bethlehem Steel Company, a corporation, is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and is [40] authorized to and does transact business in the State of California.

II.

Answering the allegations of Articles Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and Seventeenth, alleges that this respondent has no knowledge, information or belief sufficient to enable it to answer said Articles, or any of them, and, basing its denial upon that ground, denies each and every, all and singular, generally and specifically said allegations.

III.

Answering the allegations of Article Eighth. this respondent admits that that certain ship known as S. S.

“Frank G. Drum” was on April 6, 1944, on navigable waters of the United States, at the repair docks of this respondent at Terminal Island, Los Angeles Harbor, State of California, for the purpose of undergoing repairs by this respondent. Alleges that this respondent is without sufficient information or belief to enable it to answer the allegation that the respondent, Tide Water Associated Oil Company, a corporation, and John Four were the owners and operators of the S. S. “Frank G. Drum,” and, placing its denial upon that ground, denies said allegations. Denies each and every, all and singular, generally and specifically all other allegations contained in Article Eighth.

IV.

Answering the allegations of Articles Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth, this respondent denies each and every, all and singular, generally and specifically said allegations.

V.

Answering the allegations of Article Eighteenth, this [41] respondent admits that the S. S. “Frank G. Drum” has been within the district and jurisdiction of this Court during the pendency of the libel.

VI.

Answering the allegations of Article Nineteenth, this respondent denies that all and singular or all or singular the premises are true but admits that if true they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VII.

Answering the allegations of Article Twentieth, this respondent denies that respondent, Bethlehem Steel Corporation, a corporation, was or is transacting business in the State of California or within the jurisdiction of this Honorable Court, but admits as aforesaid that Bethlehem Steel Company, a corporation, was and is transacting business in the State of California.

For a Further and First Affirmative Defense, This Answering Respondent Alleges:

I.

That the accident or occurrence mentioned in the libel and complaint and whatever damage or injury, if any, has been sustained by libelant by reason thereof were the result of inevitable and unavoidable accident so far as this respondent is concerned.

For a Further and Second Affirmative Defense, This Answering Respondent Alleges:

I.

That the accident or occurrence mentioned in the libel and complaint and whatever damage or injury, if any, has been sustained by libelant by reason thereof were caused and resulted [42] solely by reason of the negligence of libelant, and not by reason of any negligence on the part of this respondent.

For a Further and Third Affirmative Defense, This Answering Respondent Alleges:

I.

The libelant fails to state a claim against this respondent upon which relief can be granted.

For a Further and Fourth Affirmative Defense, This Answering Respondent Alleges:

I.

Upon information and belief that at all times referred to in the libel and complaint libelant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions being employed and used aboard vessels of the type of the S. S. "Frank G. Drum"; upon information and belief that at the time of the accident alleged in the libel and complaint, the risks and dangers incident to the work in which libelant was engaged and the risks and dangers incident to the manner in which libelant was performing said work, and the risks and dangers then existing at the place of the alleged accident, including the risk and danger of personal injury of the nature and in the manner suffered or alleged to have been suffered by the libelant, were open, obvious, apparent and well known to libelant and were fully appreciated by him or should have been fully appreciated by a man of his experience and calling.

II.

Upon information and belief that despite and contrary to his knowledge, experience and familiarity as aforesaid, libelant [43] carelessly, negligently, recklessly, voluntarily and unnecessarily placed himself in a position where he was exposed to the risk and danger of injury of the

nature that occurred or was alleged to have occurred to libelant; upon information and belief that libelant was negligent in and about the premises in other respects concerning which this respondent is not now advised but which respondent begs leave to offer proof of as and when advised and to amend this answer accordingly.

III.

Upon information and belief that the injuries suffered by libelant, or alleged to have been suffered by libelant, if any, were solely and proximately caused by libelant's recklessness, carelessness and negligence as aforesaid.

For a Further and Fifth Affirmative Defense, This Answering Respondent Alleges:

I.

Refers to and incorporates herein as if fully set forth all the allegations contained in Articles I and II of the Fourth Affirmative Defense hereinabove.

II.

Denies as aforesaid that this respondent was negligent either as alleged in the libel and complaint or otherwise or at all but alleges upon information and belief that if this respondent was negligent in any respect and if such negligence was a proximate or contributing cause of the alleged injuries, if any, nevertheless said injuries were proximately caused and contributed to by libelant's own recklessness, carelessness and negligence as aforesaid.

III.

Refers to and incorporates herein as if fully set forth [44] all the allegations contained in Articles I and II of the Fourth Affirmative Defense hereinabove.

IV.

Alleges that by reason of the premises and the foregoing libelant assumed the risks and dangers aforesaid and the risk and danger of all injuries suffered by libelant, if any.

Wherefore, respondent prays that the libel of the libelant be dismissed; that it have and recover its costs of suit herein, and for such other and further relief as the Court may deem proper.

Dated: March 20, 1946.

LILLICK, GEARY, McHOSE & ADAMS
JOHN C. McHOSE

Attorneys for Respondent, Bethlehem Steel Company,
a corporation [45]

[Verified.] [46]

Received Apr. 11, 1945. Hon and Jarrett, M.R., Attorney for Plaintiff.

Received copy of the within Answer this 11th day of April, 1946. Lasher B. Gallagher, Attorney for Tide Water Asso. Oil Co.

[Endorsed]: Filed Apr. 12, 1946. [47]

[Title of District Court and Cause]

ANSWER OF RESPONDENT TIDE WATER ASSOCIATED OIL COMPANY, A CORPORATION

Comes now Respondent Tide Water Associated Oil Company, a corporation, and answers the libel herein as follows:

I.

Admits the allegations of the First and Second Articles.

II.

Respondent has no information or belief with reference to the identities or the capabilities of any of the individuals, associates, corporations or other entities referred to or meant to be referred to by the libellant by the fictitious designations John One, John Two, John Three, John Four, John Five or John Six in the Third and Fourth Articles and has no information or belief upon the subject sufficient to enable it to answer the allegations set forth in the Third, Fourth, Fifth, Sixth and Seventh Articles and [48] placing its denial thereof upon said ground denies said allegations and each thereof, generally and specifically.

III.

Answering the allegations of the Eighth Article, this respondent admits that it was the owner of the SS "Frank G. Drum" and that said vessel was at the repair docks of the Bethlehem Steel Corporation, a corporation, at all times mentioned in the libel and that it was docked at said location at said time and place for the purpose of undergoing repairs by the Bethlehem Steel Corporation, a corporation.

Further answering the allegations of the Eighth Article, respondent alleges that at all times referred to in the libel the said vessel was under requisition charter to the United States of America and that at all times mentioned in the libel said vessel had been withdrawn from navigation and that all of the engine room facilities, including those designed and actually in the vessel for the purpose of generating electricity, were and each thereof had been shut down. Respondent further alleges that the said vessel, at all times mentioned in the libel, was an ocean-vessel under the Flag or control of the United States and that the sole and exclusive right to control the operation, charter, requisition or use thereof was the prerogative of the Administrator, War Shipping Administration, as provided in and by Executive Order No. 9054, 7 Federal Register, 837, as amended by Executive Order No. 9244, 7 Federal Register, 7327, and that at none of the times or places referred to in the libel did this respondent have the right to control the operation or charter or requisition or use of said vessel.

IV.

Respondent admits the allegations of the Ninth Article.

V.

Respondent has no information or belief upon the subject sufficient to enable it to answer the allegations set forth in the [49] Tenth Article, excepting that portion thereof which might include this respondent from and including the last semicolon in said Tenth Article, and placing its denial thereof upon said ground, denies said allegations and each thereof.

With reference to the allegation "that at said time and place the Respondents knew or in the exercise of ordinary

care should have known all of the duties of Libellant as above set forth" this respondent, for itself alone and not for any other respondent, denies said disjunctive allegation and each part thereof.

VI.

Answering the allegations of the Eleventh Article, this respondent denies that the libellant entered said vessel for the benefit of this respondent.

With reference to the balance of the allegations in the Eleventh Article, this respondent has no information or belief upon the subject sufficient to enable it to answer the same and placing its denial thereof upon said ground denies said allegations and each thereof.

Respondent specifically denies that the libellant was an invitee of this respondent.

With further reference to the status of the libellant, respondent is informed and believes and therefore alleges that the libellant was not at any time referred to in said libel a commissioned or warrant or petty officer of the Coast Guard.

VII.

Answering the allegations of the Twelfth Article, this respondent admits that there was no artificial illumination at or near the place where the libellant sustained his injury unless the libellant possessed a flashlight or spotlight or lantern or some other means of illumination. [50]

With reference to the remaining allegations and each thereof set forth in the Twelfth Article, respondent denies said allegations and each thereof and in this connection specifically denies that it caused or permitted the hatch to the bumper of said vessel to remain open or unguarded

or in a dark condition and denies that it maintained the said hatch in an open or unguarded or dark condition and denies that the accident complained of was entirely or at all due to any incompetency or fault or negligence or carelessness or unlawfulness of this respondent or that there was any incompetency or fault or negligence or carelessness or unlawfulness on the part of this respondent and denies that this respondent is liable for damage, if any, because of any fault on the part of this respondent or otherwise and denies that this respondent was at all at fault in any respect.

VIII.

Answering the allegations of the Thirteenth Article, this respondent denies that it invited or permitted libellant onto said vessel and denies each and every allegations set forth in said Thirteenth Article.

IX.

Answering the allegations of the Fourteenth Article, respondent admits that libellant did sustain some injury, the extent of which is not known to respondent, but denies the remaining allegations and each thereof in said Fourteenth Article and denies that libellant has been damaged in the sum of \$45,000.00, or in any other sum whatsoever or at all.

X.

Answering the allegations of the Fifteenth Article, respondent admits that the libellant was confined to the United States Naval Hospital in Long Beach and to the Naval Convalescent Hospital in San Bernardino, but has no information or belief upon the subject as to the length of each confinement or with reference to [51] the physical

ability or condition of the libellant and placing its denial thereof upon said ground denies said allegations and each thereof. Respondent specifically denies that any of the matters or things referred to in the Fifteenth Article occurred or took place or existed as a result of any negligence on the part of this respondent either as alleged or otherwise or at all.

XI.

Answering the allegations of the Sixteenth Article, this respondent denies that any of the matters or things therein referred to occurred, took place or existed as a result of any negligence on the part of this respondent. With reference to the allegations stating the condition of libellant's right leg, this respondent has no information or belief upon the subject sufficient to enable it to answer said allegations and placing its denial thereof upon said ground denies said allegations and each thereof.

XII.

Respondent has no information or belief upon the subject sufficient to enable it to answer the allegations or any thereof set forth in the Seventeenth Article and placing its denial thereof upon said ground denies said allegations and each thereof and denies that libellant has been damaged in the sum of \$25,000.00, or in any other sum whatsoever or at all.

XIII.

Answering the allegations of the Eighteenth Article, respondent admits that the SS "Frank G. Drum" has been within the district and jurisdiction of this Court during the pendency of the libel.

XIV.

Answering the allegations of the Nineteenth Article, this respondent denies that all or singular the premises are true or that any premise is true excepting as hereinabove specifically admitted or alleged but admits that the premises are within the Admiralty and [52] Maritime Jurisdiction of this Honorable Court.

XV.

Answering the allegations of the Twentieth Article, this respondent for itself admits that at all times mentioned in the libel this respondent was and still is transacting business in the State of California but by this admission does not admit that at the time or place of the happening of the accident or with reference to the presence of the libellant on board the said SS "Frank G. Drum" this respondent was transacting any business whatsoever or that the presence of the libellant aboard said vessel had the slightest connection with any business being transacted by this respondent.

For a Further and First Affirmative Defense, Respondent Alleges:

I.

That the accident or occurrence mentioned in the libel and whatever damage or injury, if any, has been sustained by libellant by reason thereof were the result of inevitable and unavoidable accident so far as this respondent is concerned.

For a Further and Second Affirmative Defense, Respondent Alleges:

I.

That the accident or occurrence mentioned in said libel and whatever damage or injury, if any, has been sustained by libellant by reason thereof were caused and resulted solely by reason of the negligence of libellant and not by reason of any negligence on the part of this respondent.

For a Further and Third Affirmative Defense, Respondent Alleges:

I.

Upon information and belief that at all times referred to [53] in the libel, libellant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions being employed and used aboard vessels of the type of the SS "Frank G. Drum"; upon information and belief that at the time of the accident alleged in the libel the risks and dangers incident to the work in which libellant was engaged and the risks and dangers incident to the manner in which libellant was performing said work, and the risks and dangers then existing at the place of the alleged accident. including the risk and danger of personal injury of the nature and in the manner suffered or alleged to have been suffered by the libellant, were

open, obvious, apparent and well known to libellant and were fully appreciated by him or should have been fully appreciated by a man of his experience and calling.

II.

Upon information and belief that despite and contrary to his knowledge, experience and familiarity as aforesaid, libellant carelessly, negligently, recklessly, voluntarily and unnecessarily placed himself in a position where he was exposed to the risk and danger of injury of the nature that occurred or was alleged to have occurred to libellant; upon information and belief that libellant was negligent in and about the premises in other respects concerning which this respondent is not now advised but which respondent begs leave to offer proof of as and when advised and to amend this answer accordingly.

III.

Upon information and belief that the injuries suffered by libellant, or alleged to have been suffered by libellant, if any, were solely and proximately caused by libellant's recklessness, carelessness and negligence as aforesaid. [54]

For a Further and Fourth Affirmative Defense, Respondent Alleges:

I.

Refers to and incorporates herein as if fully set forth all the allegations contained in Articles I and II of the Third Affirmative Defense hereinabove.

II.

Denies as aforesaid that this respondent was negligent either as alleged in the libel or otherwise or at all but alleges upon information and belief that if this respondent was negligent in any respect and if such negligence was a proximate or contributing cause of the alleged injuries, if any, nevertheless said injuries were proximately caused and contributed to by libellant's own recklessness, carelessness and negligence as aforesaid.

III.

Alleges that by reason of the premises and the foregoing libellant assumed the risks and dangers aforesaid and the risk and danger of all injuries suffered by libellant, if any.

Wherefore, respondent prays that the libel of the libellant be dismissed; that it have and recover its costs of suit herein, and for such other and further relief as the Court may deem proper.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation [55]

[Verified.] [56]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 29, 1946. [57]

[Title of District Court and Cause]

SPECIAL INTERROGATORIES

Special Interrogatories Addressed to Respondent Tidewater Associated Oil Company:

As used in the questions that follow, "standby crew" refers to those members of the ship's company of the "S. S. Frank G. Drum" who had duties to perform in behalf of the ship while she was in a repair status at the repair docks of the Bethlehem Steel Company, and/or who were living aboard the vessel at that time. "Repair crew" refers to those employes of the Bethlehem Steel Company who were engaged in repairing the "S. S. Frank G. Drum" while she was in a repair status.

1. Were the members of the standby crew employes of, and paid by the Tidewater Associated Oil Company?

2. What is the name, rank or rating at the time of the accident, and last known address of each member of the standby crew?

3. Which of the persons mentioned in question 2 were actually on duty aboard the "S. S. Frank G. Drum" at 2100 on [58] August 6, 1944?

4. Who was the Captain of the "S. S. Frank G. Drum" on August 6, 1944 and what is his last known address?

5. Who was in command of the "S. S. Frank G. Drum" on August 6, 1944?

6. What were the duties of each individual member of the standby crew while the "S. S. Frank G. Drum" was at the Bethlehem Steel Company's Repair Yards?

7. Were any members of the standby crew to inspect the ship for any reason while it was in a repair status?

8. If the answer to the preceding question is "No," then, who was to inspect the vessel for fire hazards, leaks, sabotage, etc.?

9. Did any members of the standby crew have the responsibility of seeing to it that the bunker hatches were properly secured? If not, please explain in detail why it wasn't their responsibility?

10. If the answer to the first part of the preceding question is "No," whose duty was it to see to it that the bunker hatches were properly secured?

11. Was the nature of the repairs being made on the "S. S. Frank G. Drum" such that the bunker hatch into which Richardson fell had to be uncovered on the evening of August 6, 1944?

12. If the repair crew of the Bethlehem Steel Company had uncovered a bunker hatch or other hold for any reason, was it the duty of any member of the standby crew to see to it that such bunker hatch or hold was covered, or roped off and lighted, or some other precautionary measure taken at the end of the working day? If not, who had the duty to take appropriate security measures?

13. Why was the bunker hatch into which Richardson fell open and uncovered at 2100 on August 6, 1944?

14. Why was the bunker hatch into which Richardson fell unlighted at 2100 on August 6, 1944? [59]

15. Why was the bunker hatch into which Richardson fell unguarded or not roped off at 2100 on August 6, 1944?

16. When the "S. S. Frank G. Drum" was at the Bethlehem Steel Company's Repair Yards, was there a

fixed time of day at which all hatches, not being worked in, were to be secured?

17. Was it customary for the ship's crew to leave a bunker hatch uncovered, unlighted, unguarded, and not roped off at night?

18. Were there any fixed lights on the "S. S. Frank G. Drum" that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell?

19. Did the ship have any portable lights that could have been used for this purpose?

20. If the answer to the preceding question is "No," were such lights available at the Bethlehem Steel Company's Repair Yards?

21. Where were the members of the standby crew at the time the accident in question occurred?

22. Was there any requirement or regulation in effect on August 6, 1944 that some member of the ship's crew should be stationed at or near the gang plank at all times?

23. Was there a member of the ship's crew stationed at or near the gangplank at 2105 on August 6, 1944?

24. Did the Tidewater Associated Oil Company know that the "S. S. Frank G. Drum" would be inspected by the United States Coast Guard while she was tied up at the repair docks?

25. If the answer to the preceding question is "Yes," did the Tidewater Associated Oil Company know that in making such inspections the Coast Guardsmen making the inspection could inspect the entire ship from stem to stern?

26. Had the members of the standby crew been told that the United States Coast Guard might inspect the "S. S. Frank G. Drum" while it was tied up at the repair docks? [60]

27. Had the "S. S. Frank G. Drum" ever been inspected by any members of the United States Coast Guard during the war prior to this accident?

28. If the answer to the preceding question is "Yes," had these inspections always been made by a Coast Guardsman of at least petty officer rating or by a detail under the immediate command of a Coast Guardsman of such rating?

29. Had the members of the ship's crew ever been told that a Coast Guardsman with a rating lower than petty officer was not authorized to board the vessel alone?

30. Did the Tidewater Associated Oil Company ever challenge the right of a Coast Guardsman of less than petty officer rating to board the "S. S. Frank G. Drum"?

31. Did the Tidewater Associated Oil Company ever take any steps to keep Coast Guardsmen of less than petty officer rating off the "S. S. Frank G. Drum"?

32. Did the Tidewater Associated Oil Company ever protest to the Coast Guard authorities about Coast Guardsmen of less than petty officer rating boarding the "S. S. Frank G. Drum" unaccompanied by commissioned or petty officers? If so, please give the details.

33. Did a member of the ship's crew make a report of this accident to the Tidewater Associated Oil Company? If so, who?

34. If the answer to the preceding question is "No," did anybody make a report of this accident to the Tide-water Associated Oil Company? If so, who?

GAINES HON and
IRVING FEINTECH

By Gaines Hon

Attorneys for Libellant [61]

Received copy of the within interrogatories this 7 day of November, 1946. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

[Endorsed]: Filed Nov. 8, 1946. [62]

[Minutes: Friday, October 18, 1946]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for (1) pre-trial hearing, and (2) for setting for trial; Gaines Hon and Robert M. Newell, Esqs., appearing as proctor for the libellant; Messrs. Lillick, Geary, McHose and Adams, by John C. McHose, Esq., appearing as proctor for the Bethlehem Steel Corporation; Lasher B. Gallagher, Esq., appearing as proctor for the Tide Water Associated Oil Company; and both sides answering ready, respective counsel and the Court discuss the questions of law and fact involved herein. Counsel state that there does not appear to be any matter which can be covered by a formal pre-trial stipulation and order, and the Court, therefore, does not require counsel to prepare such document.

It is ordered that this cause be, and it hereby is, continued to 10 A. M., November 4, 1946, for setting for trial. [63]

[Title of District Court and Cause]

SPECIAL INTERROGATORIES

Special Interrogatories Addressed to Respondent Bethlehem Steel Company:

As used in the questions that follow, "standby crew" refers to those members of the ship's company of the "S. S. Frank G. Drum" who had duties to perform in behalf of the ship while she was in a repair status at the repair docks of the Bethlehem Steel Company, and/or who were living aboard the vessel at that time. "Repair Crew" refers to those employes of the Bethlehem Steel Company who were engaged in repairing the "S. S. Frank G. Drum" while she was in a repair status.

1. Had a repair crew or any other employes of the Bethlehem Steel Company worked on the "S. S. Frank G. Drum" on August 6, 1944? If not, when was the last time such persons had worked on the vessel? [64]

2. What is the name and last known address of the man in charge of the repair crew on the "S. S. Frank G. Drum" on August 6, 1944, or the last repair crew to work on the ship, if no repair crew was working on August 6, 1944?

3. What is the name and last known address of the superintendent in charge of the repair crew referred to in the preceding question?

4. What are the names and last known addresses of the watchmen who were on duty at the entrance to

Bethlehem Steel Company's Repair Yards through which Richardson entered the yards and the watchman who was stationed at the foot of the gangplank of the "S. S. Frank G. Drum" at 2100 on August 6, 1944?

5. Are any of the aforementioned individuals presently employed by Bethlehem Steel Company? If so, what are their names and present addresses?

6. How many men were there in the last repair crew on board the "S. S. Frank G. Drum" prior to 2100 on August 6, 1944?

7. Was the nature of the repairs being made on the "S. S. Frank G. Drum" at the time this accident occurred such that the bunker hatch into which Richardson fell had to be uncovered while the repair crew was actually at work?

8. If the answer to the preceding question is "Yes," was there any reason why the bunker hatch could not have been covered or roped off and lighted or otherwise guarded at the end of the last working day immediately preceding the accident in question?

9. Were the members of the repair crew instructed to cover any hatches at the end of the working day, or, if it was decided by the foreman or some other responsible person that a hatch should be left uncovered, what was the repair crew instructed to do to warn others of this condition?

10. At the time this accident occurred, was there a fixed time of day at which all hatches not being worked in were to be secured [65]

11. Why was the hatch into which Richardson fell left uncovered on the evening of August 6, 1944?

12. Why was the hatch into which Richardson fell unlighted on the evening of August 6, 1944?

13. Why was the hatch into which Richardson fell unguarded on the evening of August 6, 1944?

14. It has been stipulated that the Bethlehem Steel Company provided electric power for the ship while it was in a repair status. Did the Bethlehem Steel Company have the right to turn on any of the ship's lights that lighted the deck while the vessel was in a repair status?

15. Did the Bethlehem Steel Company have the right to install and turn on portable or temporary lights to illuminate the deck of the "S. S. Frank G. Drum"?

16. Did the Bethlehem Steel Company have any extension lights or other suitable lighting equipment that could have been used to light the deck of the "S. S. Frank G. Drum" on the evening of August 6, 1944?

17. If the answer to the preceding question is "Yes," would such equipment have been furnished to the "S. S. Frank G. Drum" upon the request of a proper member of the ship's crew?

18. Was it the duty of the civilian guards at the entrance to the Bethlehem Yards to keep any unauthorized persons out of the yards?

19. Was it the duty of Bethlehem's civilian guard to keep any trespassers or other unauthorized persons from boarding the "S. S. Frank G. Drum"?

20. If the answer to the preceding question is "Yes," were such guards instructed that Coast Guardsmen with a rating of less than petty officer were not to board any vessel in the repair yard for purposes of inspection unless accompanied by such officer?

21. At the time this accident occurred, did the Bethlehem [66] Steel Company know that the Coast Guard would inspect ships tied up at the repair docks?

22. Did the Bethlehem Steel Company know that in making such inspections, the Coast Guardsmen had the right to inspect the entire vessel from stem to stern?

GAINES HON and
IRVING FEINTECH

By Gaines Hon

Attorneys for Libellant [67]

Receipt of copy of the within instrument is acknowledged this 7 day of Nov., 1946. Lillick, Geary, McHose & Adams, by M. Brasack.

[Endorsed] : Filed Nov. 8, 1946. [68]

[Title of District Court and Cause]

ANSWERS OF RESPONDENT, BETHLEHEM
STEEL COMPANY, TO SPECIAL INTER-
ROGATORIES

1. No. August 5, 1944 about three p. m.
2. Various types of work were in progress, such as welding, riveting, pipefitting, shipfitting, etc. Different men were in charge of each group of repair men.
3. W. J. Courtiour, c/o Bethlehem Steel Company, Shipbuilding Division, San Pedro, California.
4. Harold J. Halse, 647 West 5th Street, San Pedro; Donald Johnson, c/o Ex-Marine Guards Co., 501 Bay View, Wilmington.
5. No.
6. It is impossible to answer this question. Time records show that approximately 192 men were employed in connection with the repairs being made on August 5, 1944. Some [69] of these men were engaged in work in the shop; others on board the ship. We do not know and cannot determine the exact number on board.
7. Yes. The only means of ingress and egress and ventilation to the bunker tank in which plate work was being done.
8. This would be a matter within the control of the Frank G. Drum.
9. No. This also is in the control of the ship.
10. Not to our knowledge.
11. Do not know, as this was within the ship's control. However, it is our understanding it is quite customary to leave hatches uncovered for ventilation or other reasons.

12. Do not know, as this was within the ship's control. However, we do not believe it is customary to light the decks of tankers at night.

13. Do not know, as this was within the ship's control. However, we do not understand that it is customary to provide guards for such purposes.

14. No. Electric power was furnished for ship's use as requested by ship's officers.

15. Yes, but only when and where necessary to proceed with repair work.

16. Yes, if required by ship's officers.

17. Yes.

18. Yes.

19. No. Bethlehem maintained no civilian guard at the ship.

20. Do not know.

21. Yes. [70]

22. Do not know what right of inspection Coast Guardsmen might have.

LILLICK, GEARY, McHOSE & ADAMS
JOHN C. McHOSE

By John C. McHose

Proctors for Respondent, Bethlehem Steel Company [71]

[Verified.] [72]

Received copy of the within Answers this.....day of November, 1946. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

Received copy of the within Answers of Respondent Bethlehem Steel Co. to Special Interrogatories this 13 day of January, 1946. Robert M. Newell, Attorney for Libellant.

[Endorsed]: Filed Jan. 14, 1947. [73]

[Title of District Court and Cause]

ANSWERS OF RESPONDENT TIDE WATER ASSOCIATED OIL COMPANY, TO SPECIAL INTERROGATORIES

1. The members of the crew aboard the vessel were there merely as a security watch. These members of the crew were paid by Tide Water Associated Oil Company, a corporation.

2. The name, last known address, rank and rating of the members of the security watch aboard at the time of the accident are: Asa H. Humble, 3rd Mate, 3660—47th St. San Diego, California; J. J. Schleef, Chief Engineer, 1275—12th Avenue, San Francisco, California; B. Bisagno, Bos'n, Fort Jones, California.

3. See answer to number 2.

4. O. Bengston, 1940 Anza Street, San Francisco, California.

5. The vessel was withdrawn from navigation.

6. To act as security watch.

7. The vessel had been delivered to the Bethlehem [74] Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same.

8. There were no fire hazards aboard the vessel. All machinery was shut down. The hull was in good condition.

9. No. The vessel had been delivered to the shipyard for repairs.

10. This is a question of law for the court to decide.

11. Employees of the shipyard are the only ones who can tell the nature of repairs or why the bunker hatch was uncovered.

12. No. The last part of the question is a question of law for the court to decide.

13. This question can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of this respondent.

14. There was no duty on the part of any person connected with this respondent to light it.

15. There was no duty on the part of this respondent to guard or rope off the bunker hatch.

16. This respondent knows nothing of the rules, if any, governing the actions of the employees of the shipyard with reference to the bunker hatch.

17. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the bunker hatch while the vessel was in the shipyard for inspection and repair.

18. No.

19. No.

20. This respondent does not know.

21. Chief Engineer Schleef was standing on the starboard side of the poop deck. Bos'n Bisgano was in the same place. Asa H. Humble, 3rd Mate, was in his quarters.

22. Not that this respondent knows of. [75]

23. No; excepting the two who were on the poop deck.

24. Tide Water Associated Oil Company knew that the statutes of the United States permitted certain designated persons in the Coast Guard to board the vessel any

time such persons were ordered to do so by proper authorities but has no information with reference to when such persons would board the vessel.

25. Tide Water Associated Oil Company had no power to restrict the Coast Guard from doing anything it undertook but would naturally expect any person to use the usual and ordinary means furnished for moving from one part of the vessel to another.

26. No member of the security watch has so stated; therefore this respondent does not know.

27. Respondent assumes so but has no actual knowledge thereof.

28. Respondent does not know.

29. Respondent does not know.

30. Respondent does not know what employees of this respondent may have done.

31. Respondent does not know what any employees of respondent may have done in this respect.

32. No.

33. The Master.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corp. [76]

[Verified.] [77]

Received copy of the within Answers to Interrogatories this 6th day of February, 1947. Irving Feintech & Gaines Hon, by H. Goodman, Proctors for Libellant.

Received copy of the within Answers to Interrogatories this 6th day of February, 1947, Proctors for Bethlehem Steel Co., 6 February 47, P. Raven.

[Endorsed]: Filed Feb. 7, 1947. [78]

[Minutes: Tuesday, February 11, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for trial; Irving Feintech, Gaines Hon, and Robert M. Newell, Esqs., appearing as counsel for the plaintiff; Messrs. Lillick, Geary, McHose and Adams, by John C. McHose, Esq., and Bryan C. Moore, Esq., appearing as proctor for respondent Bethlehem Steel Company; Lasher B. Gallagher, Esq., appearing as proctor for the Tide Water Associated Oil Co.; and both sides answering ready, the Court and respective counsel discuss the pleadings.

It is stipulated and ordered that the true name of the respondent sued as the Bethlehem Steel Corporation is Bethlehem Steel Company and that the libel may be amended by interlineation wherever the name appears in the libel, and the libel is amended at this time in open court.

On motion of the libelant it is ordered that the libel be dismissed as to the fictitiously named respondents.

On motion of respondent Bethlehem Steel Company it is ordered that the answer of the said respondent may be amended by interlineation to change the word "Delaware" to "Pennsylvania" in line 26 of page 1, and the answer is amended by interlineation at this time in open court.

Respective counsel stipulate to certain matters. Libelant's Exhibit 1 is offered and admitted in evidence. Attorney Hon makes an opening statement for the libelant.

At 11:05 A. M. court recesses. At 11:12 A. M. court reconvenes and all being present as before, it is ordered that the trial proceed. [79]

Attorney McHose makes opening statement in behalf of the respondent Bethlehem Steel Company. Attorney Gallagher makes opening statement in behalf of the respondent Tide Water Associated Oil Company.

David Lawton Richardson, libelant herein, is called, sworn, and testifies in his own behalf. Libelant's Exhibit 2 is marked for identification.

At noon court recesses until 2 P. M. At 2 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

David Lawton Richardson, libelant herein, resumes the stand and testifies further. Wm. R. Maloney, Jr., witness for libelant, is called, sworn, and testifies. Libelant's Exhibits 3, 4, and 5, respectively, are offered and admitted in evidence. At 3:20 P. M. Court recesses. At 3:30 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

David Lawton Richardson, libelant herein, heretofore sworn, resumes the stand and testifies further. Respondents' Exhibits A, B, and C are offered and admitted in evidence.

At 4:30 P. M. court recesses in this trial until 10 A. M., Feb. 12, 1947. [80]

[Minutes: Wednesday, February 12, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for further trial; Gaines Hon, Irving Feintech, and Robert M. Newell, Esqs., appearing as proctors for the libelant; Messrs. Lillick, Geary, McHose and Adams, by John C. McHose, Esq., and Bryan C. Moore, Esq., appearing as proctor for the respondent Bethlehem Steel Co.; Lasher B. Gallagher, Esq., appearing as proctor for the Tide Water Associated Oil Co.:

David L. Richardson, libelant, heretofore sworn, testifies further.

Chas. B. Hart, witness for libelant, is called, sworn, and testifies. At 11:05 A. M. court recesses. At 11:15 A. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

Chas. B. Hart testifies further. Frank B. Higbee, witness for libelant, is called, sworn, and testifies, and also testifies as a witness for the respondents. Libelant's Exhibit 6 is offered and admitted in evidence.

At 12:05 P. M. court recesses until 2 P. M. At 2 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

Frank B. Higbee resumes the stand and testifies further. At 2:45 P. M. court recesses. At 3 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

John S. Stephens, witness for the respondents, is called out of order, is sworn, and testifies.

Wm. A. Harrington, witness for respondent Bethlehem Steel Co., is called out of order, sworn, and testifies.

Respondents' Exhibit D is offered and admitted in evidence. Respondents' Exhibit E is marked for identification.

At 4:40 P. M. court recesses in this trial until 10 A. M., Feb. 13, 1947. [81]

[Minutes: Thursday, February 13, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for further trial; Gaines Hon, Irving Feintech, and Robert M. Newell, Esqs., appearing for the plaintiff; John C. McHose and Bryan C. Moore, Esqs., appearing for respondent Bethlehem Steel Co.; Lasher B. Gallagher, Esq., appearing for respondent Tide Water Associated Oil Co.:

Libelant's Exhibit 2, heretofore marked for identification, is offered and admitted into evidence.

William A. Harrington, a witness for respondent Bethlehem Steel Co., heretofore sworn, resumes the stand and testifies further.

Attorney McHose makes an offer of proof in behalf of respondent Bethlehem Steel Co., which is rejected by the Court.

James E. Taylor, a witness for respondents, is called, sworn, and testifies.

David L. Richardson, libelant herein, heretofore sworn, is recalled and testifies further.

It is stipulated and ordered that the special interrogatories propounded by libelant to the respective respondents Bethlehem Steel Company and Tide Water

Associated Oil Co., be deemed read into evidence in the record.

At 11:05 A. M. court recesses and reconvenes at 11:15 A. M., all present as before. It is ordered that trial proceed. [82]

On motion of libelant it is ordered that amendment to the libel may be made amending article Second A and counsel is directed to file said amendment in writing.

Libelant rests.

William J. Courtiour, a witness for respondent Bethlehem Steel Co., is called, sworn, and testifies.

Libelant's Exhibit 7 is offered and admitted into evidence.

William J. Courtiour resumes the stand and testifies further.

Respondents' Exhibits F and G are offered and admitted into evidence.

J. J. Schleef, a witness for respondent Tide Water Associated Oil Co., is called, sworn, and testifies.

At 3:20 P. M. court recesses and reconvenes at 3:35 P. M.; all present as before. It is ordered that trial proceed.

J. J. Schleef resumes the stand and testifies further.

Respondent's Exhibit E is offered and admitted into evidence.

Asa H. Humble, Albert D. Vanover and Adrian Roland Frederick are respectively called, sworn, and testify for respondent Tide Water Associated Oil Co.

At 4:45 P. M. it is ordered that this cause be, and it hereby is, continued to February 14, 1947, at 10 A. M., for further trial. [83]

[Title of District Court and Cause]

AMENDMENT TO LIBEL

In accordance with the stipulation of the parties hereto, Libellant's Libel is hereby amended by inserting therein the following:

ARTICLE SECOND A

That at all times herein mentioned John One, John Five and John Six were the agents, servants and/or employees of the respondents, Bethlehem Steel Company, a corporation, and/or Tidewater Associated Oil Company, a corporation, and at all times herein mentioned were acting within the course and scope of their employment and/or agency.

GAINES HON

[Endorsed]: Filed Feb. 14, 1947. [84]

[Minutes: Friday, February 14, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for further trial; Gaines Hon, Irving Feintech, and Robert M. Newell, Esqs., appearing for the libellant; John C. McHose and Bryan C. Moore, Esqs., appearing for respondent Bethlehem Steel Co.; Lasher B. Gallagher, Esq., appearing for respondent Tide Water Associated Oil Co.

Oscar Bengtson, a witness for respondent Tide Water Associated Oil Co., is called, sworn, and testifies.

Respondent Tide Water Exhibit H is marked for identification.

Court recesses at 10:50 A. M. and reconvenes at 11 A. M.; all present as before.

Oscar Bengtson resumes the stand and testifies further.

Both respondents rest. There is no rebuttal.

Attorney Hon files the amendment to the libel heretofore permitted by the Court.

Attorney Hon argues to the Court for the libelant.

Attorney McHose argues to the Court for respondent Bethlehem Steel Co.

At noon Court recesses to 2 P. M. Court reconvenes at 2 P. M.; all present as before. It is ordered that counsel proceed.

Attorney McHose argues further.

Attorney Gallagher argues to the Court for respondent Tide Water Associated Oil Co.

Attorney Hon argues to the Court in closing for the libelant. [85]

The Court orders the cause to stand submitted on the merits. Counsel are requested to file simultaneous memorandums of points and authorities by 5 P. M., 2-17-47. [86]

[Minutes: Friday, March 7, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

At 8:20 A. M. Court convenes in this cause on board the vessel "Frank G. Drum" in the Los Angeles harbor; the clerk and court reporter, being present; Gaines Hon and Irving Feintech, Esqs., being present as counsel for the libelant; Lasher B. Gallagher, Esq., being present as counsel for the Tide Water Associated Oil Co.; John

C. McHose, Esq., appearing as counsel for the Bethlehem Steel Co.

It is stipulated and ordered that the submission of this cause be, and it is, vacated and the trial re-opened for the purpose of adducing further evidence, consisting of an inspection by the Court of the scene of the accident.

The Court makes a tour of inspection, following the line of travel of the libelant from the time he came aboard the vessel until the accident occurred, according to his testimony. Respective counsel demonstrate to the Court the manner in which the accident may have occurred according to the testimony.

At 9 A. M. it is ordered that the cause now stand re-submitted to the Court and Court adjourns herein. [87]

[Minutes: Thursday, July 10, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

It appearing that the filing of further briefs is necessary herein, and that the same have been requested of counsel, and good cause appearing therefor,

It is ordered that the submission of the above-entitled matter is vacated, and the same is reset for submission on the calendar of August 11th, 1947, at 10 o'clock A. M. Counsel need not appear on such date unless notified. [88]

[Minutes: Monday, August 11, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

For submission on the merits; no appearances in behalf of either side;

Court orders cause stand submitted. [89]

[Minutes: Tuesday, August 12, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

The Court concludes that libelant Richardson went aboard the tanker belonging to respondent Tide Water Associated Oil Company, and that when he boarded said ship, libelant did so as an invitee of the said respondent; that libelant was injured by falling through a port bunker hatch on said ship, which hatch was open and unlighted, thus creating a dangerous condition; that the injury to libelant was not occasioned, or contributed to by any negligence of said libelant.

That it did appear by a preponderance of evidence that respondent Tide Water Associated Oil Company was the owner of said tanker, and was in full possession and control of said tanker at the time of the accident, and that its officers and agents knew or should have known of said dangerous condition, and failed either to remedy said condition, or to warn libelant of the existence of such condition.

Libelant will prepare findings and judgment and submit same in accordance with the rules of this Court, within five days from date hereof, leaving blank spaces wherein the Court will insert the amount libelant shall recover, 1. for past and future pain and suffering; and 2. for past and future loss of earnings. [90]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on regularly for trial on February 11, 12, 13, and 14, 1947, before the Honorable Jacob Weinberger, United States District Judge. Messrs. Gaines Hon and Irving Feintech appeared for libelant; Messrs. Lillick, Geary & McHose, by John C. McHose and Bryan S. Moore, appeared for respondent, Bethlehem Steel Company, a corporation; and Lasher B. Gallagher appeared for respondent, Tide Water Associated Oil Company, a corporation. Evidence, both oral and documentary, was received by the court, and after the evidence had been closed and the case argued by counsel, the court ordered the case submitted upon memoranda of authorities, which were thereafter filed. On March 7, 1947, the court ordered the case reopened to permit the court to attend on board the tank vessel Frank G. Drum and examine the place of the accident. This was done and the court thereupon ordered the case resubmitted. There-[91] after, on July 10, 1947, the court ordered the case reopened for the filing of further briefs, and such briefs were filed. The case was thereupon resubmitted and the court, on August 12, 1947, announced its decision by minute order, and now makes the Following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The court finds that respondent Bethlehem Steel Company, a Pennsylvania corporation, was at all times mentioned in the libel, and now is, transacting business in the State and Southern District of California.

2. The court finds that respondent Tide Water Associated Oil Company, a Delaware corporation, was at all times mentioned in the libel, and now is, transacting business in the State and Southern District of California.

3. The court finds that at all times mentioned in the libel Tide Water Associated Oil Company was the owner and in charge and control of, and operating under time charter to the United States of America through the Administrator, War Shipping Administration, the tank vessel Frank G. Drum, which was on navigable waters of the United States, moored at the repair dock of Bethlehem Steel Company at Los Angeles Harbor, California, for the purpose of undergoing repairs.

4. The court finds that at all times mentioned in the libel libelant, David Lawton Richardson, was a member of the United States Coast Guard, acting in the capacity of Seaman First Class.

5. The court finds that on August 6, 1944 libelant was attached to Company "A", COTP Guard Batallion, Terminal Island, California, and was patrolling, among other things, docks in the control of Bethlehem Steel Company, and vessels located on navigable waters of the United States, including the Frank G. Drum, [92] owned by Tide Water Associated Oil Company.

6. The court finds that libelant's duties included attending on board certain ships, including the Frank G. Drum, to inspect conditions thereon and make certain that port security regulations in effect were being observed and maintained.

7. The court finds that respondents Bethlehem Steel Company and Tide Water Associated Oil Company knew that members of the United States Coast Guard would

make such inspections of docks and vessels, including the tank vessel Frank G. Drum, at Los Angeles Harbor during the times mentioned in the libel.

8. The court finds that at or about 9:10 p. m. on Sunday, August 6, 1944, libelant went on board the Frank G. Drum as a member of United States Coast Guard, pursuant to orders from his superior officers and in line with his duties, for the purpose of making such inspection.

9. The court finds that Tide Water Associated Oil Company brought the Frank G. Drum to a dock of Bethlehem Steel Company on or about July 26, 1944, and that Bethlehem Steel Company, pursuant to a contract to make certain repairs thereon, entered into with Tide Water Associated Oil Company, thereafter began to effect certain repairs to said vessel, including plate work in the port bunker tank which began on August 3, 1947 after said tank had been gas freed.

10. The court finds that the said contract for repairs was not a contract of bailment and that during the making of said repairs by Bethlehem Steel Company and while the vessel was at the repair yard, officers and members of the crew of the Frank G. Drum employed by Tide Water Associated Oil Company, remained on board, in charge and control of said vessel, and engaged in various work and labor and maintenance simultaneously with the performance of repair work and labor by Bethlehem Steel Company. [93]

11. The court finds that on Saturday afternoon, August 5, 1944, at about 3:00 p. m., Bethlehem Steel Company employees, who were engaged in doing repair work on board the Frank G. Drum, ceased work for the re-

mainder of that day and the next day, Sunday, August 6, 1944, and until 7 a. m. Monday morning, August 7, 1944.

12. The court finds that after the Bethlehem Steel Company employees ceased work the port bunker hatch of the Frank G. Drum, which was used by Bethlehem Steel Company employees as the sole means of ingress to and egress from the port bunker tank in which Bethlehem Steel Company was doing certain repair work to the plating of said vessel for Tide Water Associated Oil Company, was open.

13. The court finds that officers and members of the crew in control and charge of the Frank G. Drum, and who were employees of Tide Water Associated Oil Company, observed and knew that the port bunker hatch was open after the Bethlehem Steel Company ceased work on Saturday, August 5, 1944. The court further finds that with the knowledge and approval of Tide Water Associated Oil Company's employees, on board and in charge of the Frank G. Drum, said port bunker hatch remained open the remainder of that day and night and all day Sunday, August 6, 1944, and until the time of the accident and injury to libelant at or about 9:10 p. m. August 6, 1944.

14. The court finds that at the time and place of the happening of the accident, Tide Water Associated Oil Company knowingly, negligently, carelessly, and recklessly operated, conducted, controlled, and maintained that portion of the Frank G. Drum on which the port bunker hatch was located, in that officers and members of the crew in charge of said vessel knowingly, negligently, carelessly, and recklessly caused, maintained, and permitted the said port bunker hatch to remain open, unguarded

[94] and in a dark condition without any illumination whatever to warn people, and particularly libelant, on board said ship that said hatch was in said open, unguarded, and unlighted condition, all of which was well known to officers and members of the crew employed by Tide Water Associated Oil Company. The court further finds that the accident and injury to libelant was solely and proximately due to the fault, negligence, and carelessness of Tide Water Associated Oil Company. The court further finds that Tide Water Associated Oil Company was at fault and was careless and negligent at the time of the happening of the accident and injury to libelant in the following particulars:

(a) That at the times mentioned in the libel and for a period of approximately thirty hours prior to the happening of the accident [^] ~~theretofore~~, it permitted the hatch, approximately four feet by six feet in size, leading to the port bunker tank of said ship, which bunker tank was approximately 36 feet in depth, to remain open and unguarded.

(b) That at the times mentioned in the libel it permitted the hatch to the port bunker tank of said ship to remain in a dark and unlighted condition.

(c) That it failed and neglected to have or place illuminated signs or any signs or notices whatever to warn people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted.

(d) That there were no precautions taken by Tide Water Associated Oil Company to warn or advise people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted.

(e) That Tide Water Associated Oil Company, having knowledge of the open, unguarded, and unlighted condition of said hatch, failed and neglected to have any person at or near said open, unguarded, and unlighted hatch to inform people, including libelant, that the same was open, unguarded, and unlighted. [95]

(f) That Tide Water Associated Oil Company knew that said vessel would be inspected by a member of the United States Coast Guard such as libelant, and notwithstanding such knowledge permitted said hatch to remain open, unguarded, and unlighted.

15. The court finds that at the time of the occurrence of the injury to libelant the Frank G. Drum and the port bunker hatch thereon, were in charge and control of Tide Water Associated Oil Company, and were not in charge or control of Bethlehem Steel Company, and that no representative or employee of Bethlehem Steel Company was then on board said vessel.

16. That at the time of the happening of the accident and injury libelant was aboard the Frank G. Drum as an invitee of Tide Water Associated Oil Company, the owner and operator of said vessel.

17. That Tide Water Associated Oil Company, with knowledge of the existence of the dangerous condition of the port bunker hatch referred to in the libel, invited and permitted libelant to board said vessel for the purpose of making the inspection above referred to; that libelant, while making said inspection, and due to the negligence, carelessness, and recklessness of Tide Water Associated Oil Company, did fall into said open hatch a distance of approximately 36 feet to the bottom of said port bunker tank, thereby damaging and injuring libelant.

18. That as a result of the negligence of Tide Water Associated Oil Company libelant was hurt in his health, strength and activity, received a profound shock to his nervous system, and was made sick, sore and lame and was hurt about his head, limbs and body, and did receive a severe fracture of the femur causing permanent disability; that it is true that from said injuries libelant suffered great physical pain and mental anguish, and has had pain and suffering in the past and will have pain and suffering in the future, all to his damage in the sum of \$15,000.00. JW [96]

19. That libelant, due to said injuries, will suffer a permanent partial disability which has caused a loss in his earning capacity since his discharge from the United States Coast Guard, and will cause a permanent partial loss in his future earning capacity, all to libelant's further damage in the sum of \$14,400.00. JW

20. The court finds that the cause of libel is within the admiralty and maritime jurisdiction of the United States and of the Southern District of California.

21. The court finds that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were the result of an inevitable or unavoidable accident.

22. The court finds that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were caused or resulted by reason of any negligence of libelant.

23. The court finds that it is untrue that the accident, or the risk or the danger incident to the work in which libelant was engaged, or the risk or danger incident to the manner in which libelant was performing said work, or

the risk or danger then existing at the place of the accident, including the risk or danger of personal injury of a nature or in the manner suffered by libellant, were open or obvious or apparent or well known to libellant, or a man of his experience or calling.

24. The court finds that it is untrue that libellant carelessly or negligently or recklessly or voluntarily placed himself in a position where he was exposed to the risk of danger and injury of the nature that occurred to libellant.

25. The court finds that it is untrue that libellant was negligent in or about the premises.

26. The court finds that it is untrue that the injuries suffered by libellant were solely or proximately or in any degree whatever caused by recklessness or carelessness or negligence on [97] the part of libellant.

27. The court finds that it is untrue that libellant was guilty of any contributory negligence or recklessness or carelessness.

28. The court finds that it is untrue that libellant assumed any risk or danger or the risk or danger of the injuries suffered by libellant.

29. The court finds that it is untrue that at all or any times mentioned in the libel, the sole and exclusive right to control the operation of the Frank G. Drum was the prerogative of the United States or the Administrator, War Shipping Administration. The court finds that at all of said times the Frank G. Drum was under time charter to the United States through the Administrator, War Shipping Administration, but was operated and controlled by and in charge of its owner, Tide Water Associated Oil Company.

30. The court finds that at the time of the accident and injury to libelant no representative or employee of Bethlehem Steel Company was on board the Frank G. Drum, and that Bethlehem Steel Company owed no duty to Tide Water Associated Oil Company or to any other person or concern, to have or maintain any representative or employee on board said vessel.

31. The court finds that at the time of the accident the engines and boilers of the Frank G. Drum were shut down and that electrical power to meet the requirements for operating the vessel was supplied from ashore by Bethlehem Steel Company, which power was connected to the said vessel's main electrical switchboard, and use of all ship's lights thereon could be controlled by the officers and crew and those on board the Frank G. Drum.

32. The court finds that Bethlehem Steel Company did not have charge or control of the Frank G. Drum or of the port [98] bunker hatch thereon, at the time of the injury to libelant.

33. The court finds that it has not been established by the evidence that Bethlehem Steel Company was negligent in any way in connection with the performance by it of repair work on the Frank G. Drum pursuant to the contract of repair with Tide Water Associated Oil Company. The court finds that it has not been established by the evidence that Bethlehem Steel Company or its employees were responsible for leaving the port bunker hatch open and unguarded and unlighted at the time of the injury to libelant. The court further finds that even if the evidence established that Bethlehem Steel Company or its employees did leave the hatch open and unguarded when work in the port bunker tank ceased on Saturday afternoon, August

5th, this did not create a dangerous condition during daylight, and the condition only became dangerous after it became dark by reason of failure by Tide Water Associated Oil Company to provide lights at the port bunker hatch or give any warning of the dangerous condition there existing.

34. The court finds that lighting the portion of the ship around the port bunker hatch was within the control of and the duty of Tide Water Associated Oil Company, and not Bethlehem Steel Company.

35. The court finds that even if it should be found that Bethlehem Steel Company was negligent in leaving the port bunker hatch open and unguarded when work ceased Saturday afternoon, August 5th, such negligence would not have been the proximate cause, but could only have been a secondary cause of the injury to libelant. [99]

From the foregoing findings of fact, the court makes the following

CONCLUSIONS OF LAW

1. That at the time and place of the accident and injury to libelant. Tide Water Associated Oil Company was the owner and operator of and in full control and charge of the Frank G. Drum and the port bunker hatch thereon.

2. That libelant, David Lawton Richardson, committed no fault or negligence in the premises.

3. That libelant was on board the Frank G. Drum with the knowledge and consent of the owner, Tide Water Associated Oil Company, and at the time and place of the accident was an invitee of Tide Water Associated Oil Company.

4. That Bethlehem Steel Company was not a bailee of the Frank G. Drum at the time of the accident and injury to libelant.

5. That Tide Water Associated Oil Company was negligent in that it knowingly permitted the port bunker hatch to remain open and unguarded at the time and place when and where libelant was injured.

6. That Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition at the time and place when and where libelant was injured.

7. That Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition, and failed to warn libelant that such dangerous condition existed.

8. That the negligence of Tide Water Associated Oil Company was the sole and proximate cause of the accident and injury sustained by libelant.

9. That Bethlehem Steel Company committed no fault or [100] negligence in the premises. That even if the court found Bethlehem Steel Company to have been negligent in leaving the port bunker hatch open when it ceased work on Saturday, August 5th, the court concludes such negligence could not have been the primary or proximate cause of the accident and injury sustained by libelant, but could only have been a secondary cause, the primary cause

being the negligence of Tide Water Associated Oil Company.

10. That the libel against Tide Water Associated Oil Company shall be sustained, and that libelant shall be granted a final decree solely against respondent Tide Water Associated Oil Company for damages in the total sum of \$29,400.00 JW and for libelant's costs of suit herein.

11. That the libel against Bethlehem Steel Company shall be dismissed and Bethlehem Steel Company shall recover from Tide Water Associated Oil Company its costs of suit herein.

Let final decree be entered accordingly.

Dated: Los Angeles, California, August 30, 1947.

JACOB WEINBERGER
U. S. District Judge

Approved as to form as provided in Rule 7.

LILLICK, GEARY & McHOSE

By John C. McHose

Proctors for Respondent, Bethlehem Steel Company

Proctor for Respondent, Tide Water Associated
Oil Company [101]

Received copy of the within Findings etc. this 18th day of August, 1947. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

[Endorsed]: Filed August 30, 1947. [102]

In the District Court of the United States for the
Southern District of California
Central Division

In Admiralty No. 4574-W

DAVID LAWTON RICHARDSON,

Libelant,

vs.

BETHLEHEM STEEL CORPORATION, a corpora-
tion, et al.,

Respondents.

FINAL DECREE

By reason of the Law and the Findings of Fact on
file herein,

It Is Hereby Ordered, Adjudged and Decreed:

1. That libelant David Lawton Richardson do have
and recover from respondent Tide Water Associated Oil
Company, a corporation, the sum of \$29,400.00, J.W.
with interest thereon at 7% per annum from the date
hereof until paid.

2. That libelant David Lawton Richardson do have
and recover from respondent Tide Water Associated Oil
Company, a corporation, his costs of suit herein in-
curred as taxed herein pursuant to Rule 15 in the sum
of \$69.77.

3. That the libel against respondent Bethlehem Steel
Company, a corporation, be and the same is hereby dis-
missed.

4. That respondent, Bethlehem Steel Company, a corporation, do have and recover from respondent Tide Water Associated Oil Company, a corporation, its costs of suit herein as taxed [103] herein pursuant to Rule 15 in the sum of \$..... JW

Dated: Los Angeles, California, August 30, 1947.

JACOB WEINBERGER

United States District Judge

Approved as to form as provided in Rule 7.

LILLICK, GEARY & McHOSE

By John C. McHose

Proctors for Respondent, Bethlehem Steel Company

Proctor for Respondent, Tide Water Associated
Oil Company

Judgment entered Aug. 30, 1947. Docketed Aug. 30, 1947. C. O. Book 45, page 186. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy. [104]

Received copy of the within Final Decree this 18 day of August, 1947. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

[Endorsed]: Filed Aug. 30, 1947. [105]

[Title of District Court and Cause]

ASSIGNMENTS OF ERROR

Now comes the Respondent Tide Water Associated Oil Company, a corporation, and hereby assigns the following errors in the above entitled proceeding:

I.

The Court erred in finding that at all times mentioned in the libel Tide Water Associated Oil Company was in charge and control of and operating under time charter to the United States the tank vessel Frank G. Drum.

II.

The Court erred in finding that on August 6, 1944, the libelant was patrolling vessels located on navigable waters of the United States, including the Frank G. Drum. [106]

III.

The Court erred in finding that libelant's duties included attending on board certain ships, including the Frank G. Drum, to inspect conditions thereon and make certain that port security regulations in effect were being observed and maintained.

IV.

The Court erred in finding that the respondent Tide Water Associated Oil Company knew that members of the United States Coast Guard would make such inspections of vessels, including the tank vessel Frank G. Drum at Los Angeles Harbor during the times mentioned in the libel.

V.

The Court erred in finding that at or about 9:10 p. m. on Sunday, August 6, 1944, libelant went on board the Frank G. Drum as a member of the United States Coast Guard, pursuant to orders from his superior officers and in line with his duties, for the purpose of making such inspection.

VI.

The Court erred in finding that the contract for repairs was not a contract of bailment and that during the making of said repairs by Bethlehem Steel Company and while the vessel was at the repair yard, officers and members of the crew of the Frank G. Drum employed by Tide Water Associated Oil Company, remained on board, in charge and control of said vessel and engaged in various work and labor and maintenance simultaneously with the performance of repair work and labor by Bethlehem Steel Company.

VII.

The Court erred in finding that officers and members of the crew in control and charge of the Frank G. Drum and who were employees of Tide Water Associated Oil Company observed and knew [107] that the port bunker hatch was open after the Bethlehem Steel Company ceased work on Saturday, August 5, 1944.

VIII.

The Court erred in finding that with the knowledge and approval of Tide Water Associated Oil Company's employees, on board and in charge of the Frank G. Drum, said port bunker hatch remained open the remainder of that day and night and all day Sunday, August 6, 1944,

and until the time of the accident and injury to libelant at or about 9:10 p. m. August 6, 1944.

IX.

The Court erred in finding that at the time and place of the happening of the accident, Tide Water Associated Oil Company knowingly, negligently, carelessly, and recklessly operated, conducted, controlled and maintained that portion of the Frank G. Drum on which the port bunker hatch was located, in that officers and members of the crew in charge of said vessel knowingly, negligently, carelessly and recklessly caused, maintained and permitted the said port bunker hatch to remain open, unguarded and in a dark condition without any illumination whatever to warn people, and particularly libelant, on board said ship that said hatch was in said open, unguarded, and unlighted condition, all of which was known to officers and members of the crew employed by Tide Water Associated Oil Company.

X.

The Court erred in finding that the accident and injury to libelant was solely and proximately due to the fault, negligence, and carelessness of Tide Water Associated Oil Company.

XI.

The Court erred in finding that "Tide Water Associated Oil Company was at fault and was careless and negligent at the time of the [108] happening of the accident and injury to libelant in the following particulars:

"(a) That at the times mentioned in the libel and for a period of approximately thirty hours ~~therefore~~ prior to the happening of the accident, it permitted

the hatch, approximately four feet by six feet in size, leading to the port bunker tank of said ship, which bunker tank was approximately 36 feet in depth, to remain open and unguarded.

“(b) That at the times mentioned in the libel it permitted the hatch to the port bunker tank of said ship to remain in a dark and unlighted condition.

“(c) That it failed and neglected to have or place illuminated signs or any signs or notices whatever to warn people, including libelant, on or about said ship that said hatch was open, unguarded and unlighted.

“(d) That there were no precautions taken by Tide Water Associated Oil Company to warn or advise people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted.

“(e) That Tide Water Associated Oil Company, having knowledge of the open, unguarded, and unlighted condition of said hatch, failed and neglected to have any person at or near said open, unguarded, and unlighted hatch to inform people, including libelant, that the same was open, unguarded, and unlighted.

“(f) That Tide Water Associated Oil Company knew that said vessel would be inspected by a member of the United States Coast Guard such as libelant, and notwithstanding such knowledge permitted said hatch to remain open, unguarded, and unlighted.”

XII.

The Court erred in finding that at the time of the occurrence of the injury to libelant the Frank G. Drum and the port bunker [109] hatch thereon, were in charge or control of Tide Water Associated Oil Company, and were not in charge or control of Bethlehem Steel Company.

XIII.

The Court erred in finding that at the time of the happening of the accident and injury libelant was aboard the Frank G. Drum as an invitee of Tide Water Associated Oil Company.

XIV.

The Court erred in finding that Tide Water Associated Oil Company, with knowledge of the existence of the dangerous condition of the port bunker hatch referred to in the libel, invited and permitted libelant to board said vessel for the purpose of making the inspection above referred to and that libelant while making said inspection and due to the negligence, carelessness and recklessness of Tide Water Associated Oil Company, did fall into said open hatch a distance of approximately 36 feet to the bottom of said port bunker tank, thereby damaging and injuring the libelant.

XV.

The Court erred in finding that as a result of the negligence of Tide Water Associated Oil Company libelant was hurt in his health, strength and activity, received a profound shock to his nervous system, and was made sick, sore and lame and was hurt about his head, limbs and body, and did receive a severe fracture of the femur causing permanent disability and from said injuries libelant

suffered great physical pain and mental anguish, and has had pain and suffering in the past and will have pain and suffering in the future, all to his damage in the sum of \$15,000.00.

XVI.

The Court erred in finding that libelant, due to said injuries, will suffer a permanent partial disability which has [110] caused a loss in his earning capacity since his discharge from the United States Coast Guard, and will cause a permanent partial loss in his future earning capacity, all to libelant's further damage in the sum of \$14,400.00.

XVII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were the result of an inevitable or unavoidable accident.

XVIII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by the libelant by reason thereof, were caused or resulted by reason of any negligence of libelant.

XIX.

The Court erred in finding that it is untrue that the accident, or the risk or the danger incident to the work in which libelant was engaged, or the risk or damage incident to the manner in which libelant was performing said work, or the risk or danger then existing at the place of the accident, including the risk or danger of personal injury of a nature or in the manner suffered by libelant,

were open or obvious or apparent or well known to libelant, or a man of his experience or calling.

XX.

The Court erred in finding that it is untrue that libelant carelessly or negligently or recklessly or voluntarily placed himself in a position where he was exposed to the risk of danger and injury of the nature that occurred to libelant.

XXI.

The Court erred in finding that it is untrue that libelant was negligent in or about the premises. [111]

XXII.

The Court erred in finding that it is untrue that the injuries suffered by libelant were solely or proximately or in any degree whatever caused by recklessness or carelessness or negligence on the part of libelant.

XXIII.

The Court erred in finding that it is untrue that libelant was guilty of any contributory negligence or recklessness or carelessness.

XXIV.

The Court erred in finding that it is untrue that libelant assumed any risk or danger or the risk or danger of the injuries suffered by libelant.

XXV.

The Court erred in finding that it is untrue that at all or any times mentioned in the libel, the sole and exclusive right to control the operation of the Frank G. Drum was the prerogative of the United States or the Administrator, War Shipping Administration.

XXVI.

The Court erred in finding that at all times mentioned in the libel the Frank G. Drum was operated and controlled by and in charge of its owner, Tide Water Associated Oil Company.

XXVII.

The Court erred in finding that at the time of the accident and injury to libelant the Bethlehem Steel Company owed no duty to Tide Water Associated Oil Company or to any other person or concern to have or maintain any representative or employee on board said vessel.

XXVIII.

The Court erred in finding that any ship's light which [112] would have illuminated the port bunker hatch was available to the officers or crew on board the Frank G. Drum or could have been controlled by the officers and crew and those on board the Frank G. Drum.

XXIX.

The Court erred in finding that Bethlehem Steel Company did not have charge or control of the Frank G. Drum or of the port bunker hatch thereon, at the time of the injury to libelant.

XXX.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company was negligent in any way in connection with the performance by it of repair work on the Frank G. Drum pursuant to the contract of repair with Tide Water Associated Oil Company.

XXXI.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company or its employees were responsible for leaving the port bunker hatch open and unguarded and unlighted at the time of the injury to libelant.

XXXII.

The Court erred in finding that even if the evidence established that Bethlehem Steel Company or its employees did leave the hatch open and unguarded when work in the port bunker tank ceased on Saturday afternoon, August 5th, this did not create a dangerous condition during daylight, and the condition only became dangerous after it became dark by reason of failure by Tide Water Associated Oil Company to provide lights at the port bunker hatch or give any warning of the dangerous condition there existing. [113]

XXXIII.

The Court erred in finding that lighting the portion of the ship around the port bunker hatch was within the control of and the duty of Tide Water Associated Oil Company, and not Bethlehem Steel Company.

XXXIV.

The Court erred in finding that even if it should be found that Bethlehem Steel Company was negligent in leaving the port bunker hatch open and unguarded when work ceased Saturday afternoon, August 5th, such negligence would not have been the proximate cause, but could only have been a secondary cause of the injury to libelant.

XXXV.

The Court erred in concluding from the findings of fact that at the time and place of the accident and injury to libelant, Tide Water Associated Oil Company was the owner and operator of and in full control and charge of the Frank G. Drum and the port bunker hatch thereon.

XXXVI.

The Court erred in concluding from the findings of fact that libelant, David Lawton Richardson, committed no fault or negligence in the premises.

XXXVII.

The Court erred in concluding from the findings of fact that libelant was on board the Frank G. Drum with the knowledge and consent of the owner, Tide Water Associated Oil Company, and at the time and place of the accident was an invitee of Tide Water Associated Oil Company.

XXXVIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company was not a bailee of the Frank G. Drum at the time of the accident and injury to libelant. [114]

XXXIX.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it knowingly permitted the port bunker hatch to remain open and unguarded at the time and place when and where libelant was injured.

XL.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition at the time and place when and where libelant was injured.

XLI.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition, and failed to warn libelant that such dangerous condition existed.

XLII.

The Court erred in concluding from the findings of fact that the negligence of Tide Water Associated Oil Company was the sole and proximate cause of the accident and injury sustained by libelant.

XLIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company committed no fault or negligence in the premises and that even if the Court found Bethlehem Steel Company to have been negligent in leaving the port bunker hatch open when it ceased work on Saturday, August 5th, the Court concludes such negligence could not have been the primary or proximate cause of the accident and injury sustained by libelant, but could only have been a secondary cause, the primary cause being the negligence of [115] Tide Water Associated Oil Company.

XLIV.

The Court erred in concluding from the findings of fact that the libel against Tide Water Associated Oil Company shall be sustained, and that libelant shall be granted a final decree solely against respondent Tide Water Associated Oil Company for damages in the total sum of \$29,400.00, and for libelant's costs of suit herein.

XLV.

The Court erred in concluding from the findings of fact that the libel against Bethlehem Steel Company shall be dismissed and Bethlehem Steel Company shall recover from Tide Water Associated Oil Company its costs of suit herein.

XLVI.

The Court erred in failing to make a finding on the disputed allegation in Article Tenth of the Libel, that libelant's duties at said time and place as a member of the United States Coast Guard were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and ships at said Bethlehem Steel Company and that at said time and place the respondents knew or in the exercise of ordinary care should have known all of the duties of libelant as above set forth.

XLVII.

The Court erred in failing to find with reference to the disputed allegation in Article Eleventh of the Libel that at about the hour of 9:10 p. m. on August 6, 1944, libelant entered said ship, SS Frank G. Drum, for the purpose of inspecting said ship for the benefit of the respondents. [116]

XLVIII.

The Court erred in failing to find on the disputed allegation that the respondents (which includes Bethlehem Steel Company) knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained the SS Frank G. Drum and knowingly, negligently, carelessly, recklessly and unlawfully caused, maintained and permitted the hatch to the bunker of said ship to remain open and unguarded and in a dark condition without any illumination whatever to warn people on said ship that said hatch was in said condition and that all thereof was well known to the respondent Bethlehem Steel Company.

XLIX.

The Court erred in failing to find with reference to the disputed allegations in Article Twelfth that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondent Bethlehem Steel Company, in the following particulars:

(a) At all times herein mentioned, the hatch to the bunker tank of said ship, which was approximately thirty-five (35) feet in depth, remained open and unguarded.

(b) At all times herein mentioned the hatch to the bunker tank of said ship was and remained in a dark condition without any illumination whatever.

(c) There were no illuminating signs or signs whatever to warn people on or about said ship that said hatch was open and unguarded.

(d) There were no precautions taken by respondent Bethlehem Steel Company to warn or let people

on or about said ship know that said hatch was open and unguarded.

(e) Respondent Bethlehem Steel Company failed and neglected to have any person at or near said unguarded [117] hatch to inform people at or near said hatch that the same was open and unguarded.

(f) That the respondent Bethlehem Steel Company permitted said hatch to remain open, unguarded and in a dark condition, all of which constituted a trap for people on said ship at or near said hatch.

(g) Respondent Bethlehem Steel Company knew that said ship would be inspected by a member of the United States Coast Guard and notwithstanding such knowledge permitted said hatch to remain unguarded and in a dark condition.

L.

The Court erred in failing to make any finding with respect to the disputed allegation in Article Thirteenth of the Libel that notwithstanding the knowledge and existence of the dangerous condition of the ship and the hatch thereon the respondent Bethlehem Steel Company invited and permitted libelant onto said ship for the purpose of making the inspection referred to in the libel.

LI.

The Court erred in failing to find on the disputed allegation in the Thirteenth Article that the respondent Tide Water Associated Oil Company invited and permitted the libelant onto the ship for the purpose of making the inspection referred to in the Tenth and Eleventh Articles and that the libelant while making such inspection did fall into the open hatch.

LII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of the Answer of Tide Water Associated Oil Company that at all times referred to in the libel the said vessel was under requisition charter to the United States of America and that at all times mentioned in the libel said vessel had been [118] withdrawn from navigation.

LIII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of Tide Water Associated Oil Company's Answer that the said vessel, at all times mentioned in the libel, was an ocean vessel under the Flag or control of the United States and that the sole and exclusive right to control the operation, charter, requisition or use thereof was the prerogative of the Administrator, War Shipping Administration, as provided in and by Executive Order No. 9054, 7 Federal Register, 837, as amended by Executive Order No. 9244, 7 Federal Register, 7327, and that at none of the times or places referred to in the libel did said respondent have the right to control the operation or charter or requisition or use of said vessel.

LIV.

The Court erred in failing to make any finding with respect to the allegations of the Third Affirmative Defense of Tide Water Associated Oil Company that at all times referred to in the libel, libelant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions

being employed and used aboard vessels of the type of the SS Frank G. Drum.

LV.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Second Affirmative Defense.

LVI.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Third Affirmative Defense. [119]

LVII.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Fourth Affirmative Defense.

LVIII.

The Court erred in failing to make any finding with reference to the disputed question whether the libelant was or was not an invitee of the Tide Water Associated Oil Company at the specific part of and location on the ship where the accident happened.

LVIX.

The Court erred in failing to make any finding with reference to whose servants, agents or employees removed the rope guards which were around the port bunker tank at the time the vessel was brought to the shipyard of Bethlehem Steel Company and whose servants, agents and employees removed the port bunker hatch cover from its supporting stiff-leg and arranged it so that it was in the position it occupied at the time of the accident.

LX.

The Court erred in failing to conclude that the libelant is not entitled to recover any sum whatever from the respondent Tide Water Associated Oil Company and that the libel should be dismissed with costs to said respondent Tide Water Associated Oil Company.

LXI.

The Court erred in failing to find that Bethlehem Steel Company was guilty of negligence proximately causing or proximately contributing to the injuries sustained by the libelant.

LXII.

The Court erred in making Final Decree in favor of libelant and Bethlehem Steel Company and against Tide Water Associated Oil Company. [120]

LXIII.

The Court erred in ordering the libel against the respondent Bethlehem Steel Company dismissed.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

[Endorsed]: Filed Sep. 8, 1947. [121]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the
United States District Court, Southern District of
California, Central Division:

Respondent Tide Water Associated Oil Company, a corporation, respectfully prays that it may be permitted to take an appeal from the Final Decree entered in the above Court on August 30th, 1947, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignments of Error which is filed herewith and your petitioner desires to supersede the execution of said Final Decree, and herewith tenders a bond in the amount of Thirty Five Thousand Dollars (\$35,000.00), for such purpose, and prays that a superseas be allowed as part of the allowance of said appeal.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

[Endorsed]: Filed Sep. 8, 1947. [122]

[Title of District Court and Cause]

STIPULATION

This action having been tried and decided by the Honorable Jacob Weinberger, and said trial Judge now being unavailable by reason of his vacation;

It Is Stipulated, by and between the parties, that petition for an order allowing appeal may be presented to the Senior Judge for the Southern District of California, Honorable Paul J. McCormick, with like effect as if said petition were presented to the said trial Judge.

Dated: September 4th, 1947.

GAINES HON and
IRVING FEINTECH
GAINES HON

Proctors for Libelant

LILLICK, GEARY & McHOSE
JOHN C. McHOSE

Proctors for Respondent Bethlehem Steel
Corporation, a corporation [123]

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

It Is So Ordered.

Dated: September 8, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [124]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL

The petition of respondent Tide Water Associated Oil Company, a corporation, for an appeal from the Final Decree entered in the above entitled cause on August 30th, 1947, is hereby granted and the appeal is allowed.

It Is Further Ordered that a certified transcript of the record herein be forthwith transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, and

It Is Further Ordered that upon petitioner filing a bond in the sum of Thirty Five Thousand Dollars (\$35,000.00), with sufficient surety or sureties and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the determination of said appeal to the said United States Circuit Court of Appeals. [125]

Dated at Los Angeles, California, this 8th day of September, 1947.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [126]

[Title of District Court and Cause]

NOTICE OF APPEAL

The respondent Tide Water Associated Oil Company, a corporation, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Final Decree of this Court entered herein on August 30th, 1947, and from each and every part of said Decree.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated Oil
Company, a corporation

To: Edmund L. Smith,
Clerk, United States District Court;
Gaines Hon and Irving Feintech
315 W. Ninth Street, Los Angeles 15,
Proctors for Libelant;
Lillick, Geary & McHose
634 So. Spring St., Los Angeles 14,
Proctors for Respondent Bethlehem
Steel Corporation, a corporation.

[Endorsed]: Filed; mld. copy to Hon & Jarrett, 315
W. 9th St., L. A. 15, Atty. for Lib., Sep. 8, 1947. [127]

[Title of District Court and Cause]

[Affidavit of Service by Mail to Messrs. Lillick, Geary
& McHose, 634 South Spring Street, Los Angeles 14,
California.]

[Endorsed]: Filed Sep. 10, 1947. [128-129]

[Title of District Court and Cause]

STIPULATION RE AMOUNT OF SUPERSEDEAS
AND COST BOND

It Is Hereby Stipulated, by and between the parties, that the respondent Tide Water Associated Oil Company, a corporation, may file a supersedeas and cost bond in the single and total sum of Thirty-five Thousand Dollars (\$35,000.00).

Dated: September 3rd, 1947.

GAINES HON and
IRVING FEINTECH
GAINES HON

Proctors for Libelant

LILLICK, GEARY & McHOSE
JOHN C. McHOSE

Proctors for Respondent Bethlehem Steel
Corporation, a corporation

LASHER B. GALLAGHER
Proctor for Respondent Tide Water Associated
Oil Company [130]

It Is So Ordered.

Dated: September 8th, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [131]

[Title of District Court and Cause]

BOND ON APPEAL
(Supersedeas and for Costs)

Know All Men By These Presents:

Whereas, respondent Tide Water Associated Oil Company, a corporation, has appealed or is about to appeal from that certain Final Decree heretofore made and entered in the above entitled cause on August 30th, 1947; and

Whereas, Western National Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the Libelant herein and unto whom it may concern in the sum of Thirty Five Thousand and No/100 Dollars (\$35,000.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these presents and agrees that in case of default or contumacy on the part of the said Appellant, Tide Water Associated [132] Oil Company, a corporation, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named Appellant shall prosecute its appeal with effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, this 5th day of September, 1947.

WESTERN NATIONAL INDEMNITY
COMPANY, a corporation

By A. I. Stoddard

Attorney-in-Fact

State of California

County of Los Angeles—ss.

On this 5th day of September, 1947, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Western National Indemnity Company and acknowledged to me that he subscribed the name of Western National Indemnity Company thereto as principal, and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed by official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal)

M. E. BEETH

Notary Public in and for the County of Los Angeles,
State of California

My commission expires March 24, 1949.

Examined and recommended for approval as provided in Rule 13.

LASHER B. GALLAGHER

Proctor for Appellant Tide Water Associated
Oil Company, a corporation

I hereby approve the foregoing bond this 8th day of September, 1947.

PAUL J. McCORMICK

United States District Judge

The premium charged for this bond is \$700.00 per annum.

[Endorsed]: Filed Sep. 8, 1947. [133]

[Title of District Court and Cause]

NOTICE OF FILING BOND ON APPEAL

To the Libelant and to his Proctors Gaines Hon and Irving Feintech; to the Respondent Bethlehem Steel Company, a corporation, and to its Proctors, Messrs. Lillick, Geary & McHose:

You and Each of You Will Please Take Notice that the bond on the appeal herein was approved by the Honorable Paul J. McCormick, and was filed in the office of the Clerk of the District Court of the United States, for the Southern District of California, Central Division, on the 8th day of September, 1947, and said bond was executed and given by the Western National Indemnity Company, a corporation, authorized to execute surety bonds pursuant to the laws of the State of California, said bond being in the sum of Thirty Five Thousand Dollars (\$35,000.00), and is by reference thereto made a part of this Notice.

Dated: September 8th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Co., a corporation [134]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 10, 1947. [135]

[Title of District Court and Cause]

STIPULATION RE TRANSMITTAL OF EXHIBITS
AND REPORTER'S TRANSCRIPT TO APPEL-
LATE COURT

It Is Hereby Stipulated that the original exhibits in the above entitled matter and the reporter's transcript of the proceedings need not be reproduced or otherwise incorporated in the record on appeal to be transmitted to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, by the Clerk of the United States District Court, but that the originals of said exhibits and the original reporter's transcript may be transmitted to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, to be there considered as part of the record on appeal required to be sent from the United States District Court to the Circuit Court of Appeals with the same force and effect as though the same were and each thereof was reproduced and thus incorporated in the record on appeal.

Dated: September 3rd, 1947. [136]

GAINES HON and
IRVING FEINTECH
GAINES HON

Proctors for Libelant

LILLICK, GEARY & McHOSE
JOHN C. McHOSE

Proctors for Respondent Bethlehem Steel
Corporation, a corporation

LASHER B. GALLAGHER
Proctor for Respondent Tide Water Associated
Oil Company, a corporation

It Is So Ordered.

Dated: September 8th, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [137]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 143 inclusive contain the original Citation on Appeal and full, true and correct copies of Libel in Personam; Respondent Tide Water Associated Oil Company's Exceptions to Libel; Answer of Libelant to Exceptions to Libel; Minute Orders Entered December 24, 1945, March 13 and 19, 1946; Answer of Respondent Bethlehem Steel Company; Answer of Respondent Tide Water Associated Oil Company; Special Interrogatories to Respondent Tide Water Associated Oil Company; Minute Order Entered October 18, 1946; Special Interrogatories to Respondent Bethlehem Steel Company; Answers of Respondent Bethlehem Steel Company to Special Interrogatories; Answers of Respondent Tide Water Associated Oil Company to Special Interrogatories; Minute Orders Entered February 11, 12 and 13, 1947; Amendment to Libel; Minute Orders

Entered February 14, March 7, July 10, August 11 and 12, 1947; Findings of Fact and Conclusions of Law; Final Decree; Assignments of Error; Petition for Appeal; Stipulation and Order of September 4, 1947; Order Allowing Appeal; Notice of Appeal; Affidavit of Service; Stipulation and Order re Amount of Supersedeas and Cost Bond; Bond on Appeal; Notice of Filing Bond on Appeal; Stipulation and Order re Transmittal of Exhibits and Transcript; Praecipe for Apostles on Appeal and Counter Designation of Praecipe for Apostles on Appeal which, together with original Reporter's Transcript of proceedings on February 11, 12 and 13 and March 7, 1947; and Original Libelant's Exhibits 1 to 7, inclusive and original Respondents' Exhibits A to H, inclusive, transmitted herewith, constitute the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing apostles amount to \$33.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Jacob Weinberger, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, February 11, 1947

Appearances:

For the Plaintiff: Feintech and Gaines Hon, by Gaines Hon and Robert M. Newell.

For the Defendant Tide Water Associated Oil Company: Lasher B. Gallagher.

For the Defendant Bethlehem Steel Corporation: Lillick, Gary, McHose & Adams, by John C. McHose and Bryan C. Moore.

Los Angeles, California, Tuesday, February 11, 1947,
10:00 A. M.

(Case called by clerk.)

Mr. Feintech: The libellant is ready.

The Court: Let's see. We have had a pre-trial in this case?

Mr. Hon: Yes, your Honor.

The Court: Is there an order on file?

The Clerk: No, your Honor. Counsel said they could cover anything by stipulation and you waived it.

Mr. McHose: I think that is correct.

Mr. Hon: We actually had a pre-trial, your Honor.

The Court: I don't see anything of record. I am wondering if there were some stipulations. I haven't any transcript here.

Mr. Gallagher: It is my recollection, your Honor, that we arrived at no stipulations of any kind.

Mr. Hon: I am not definite on that, your Honor. I know we spent about half an hour attempting to get stipulations but just what all took place I can't recollect.

The Court: I am wondering if we can save any time this morning by going through the pleadings to see what matters we can agree upon. Shall we proceed along that line?

Mr. Hon: I would be pleased to, your Honor. I think it would probably save the court's time if we could do that. [2*]

Mr. McHose: It is agreeable to us, your Honor.

The Court: What about the John Does? What are you going to do with those?

Mr. Hon: I guess we can dismiss as to the John Does. No one was served.

The Court: The only parties involved are the Bethlehem Steel Company, a corporation, and the Tide Water Associated Oil Company, a corporation?

Mr. McHose: May we stipulate, Mr. Hon, that the Bethlehem Steel Corporation is an incorrect name? We have set forth in our answer that the proper name is the Bethlehem Steel Company, a corporation.

Mr. Hon: Then, I would like it, by interlineation in the caption and every place in the body of the libel, to read "Bethlehem Steel Company, a corporation."

The Court: "Co." or the full name?

Mr. McHose: Written out, your Honor. We have set that up in our answer.

Mr. Hon: Then, it should be "Bethlehem Steel Company, a corporation."

The Court: So ordered. Is it the same company? I mean in so far as the state of its organization is concerned.

Mr. McHose: Our answer sets that forth. There is a Bethlehem Steel Corporation but it is not authorized to do business in California, and the Bethlehem Steel Company is [3] doing business in the State of California.

The Court: Organized under the laws of what State?

Mr. McHose: The answer states the State of Delaware, but I have a notation that that is wrong and it should be the State of Pennsylvania. I don't believe it makes any difference. It is incorporated in either the State of Pennsylvania or Delaware and we know the company that is involved and, if judgment is entered against the Bethlehem Steel Company, it will be recognized.

The Court: We should have the proper company, wherever it is organized, covered by stipulation.

Mr. McHose: I believe it is the State of Pennsylvania and I suggest that we might be permitted to amend the answer, on line 26, page 1, to state a corporation organized and existing under the laws of the State of Pennsylvania.

Mr. Hon: No objection.

The Court: That will be ordered. Transacting business in the State of California?

Mr. McHose: In the State of California.

The Court: What about the Tide Water Associated Oil Company? Is that the proper designation?

Mr. Gallagher: Yes, your Honor.

The Court: There is no change there?

Mr. Gallagher: No, sir. I assume we can ignore the third and fourth articles and the fifth and the sixth. [4]

The Court: You have moved to dismiss all of the fictitious defendants, have you?

Mr. Hon: I have agreed to; yes, your Honor.

The Court: Will you do that now?

Mr. Hon: Yes, sir.

The Court: So ordered.

Mr. McHose: We could, then, strike out the third, fourth, fifth, sixth and seventh articles of the complaint.

Mr. Hon: Your Honor, I don't want to dismiss articles three, four, five and six. I agreed to dismiss as to the fictitious defendants but not to strike any paragraphs of the complaint. They will do no harm in the complaint.

The Court: The record shows the dismissal of these fictitious defendants. But what is the effect of these articles three, four and five, if you have no such fictitious defendants?

Mr. Hon: Your Honor, there are allegations in there charging certain duties upon the corporations and the employees of the corporations. They are contained in those particular articles and might not be sufficiently stated in other articles. So I think; to keep my complaint proper, I would have to leave that in in order to properly charge the duties to these corporations. It might be a technicality that might be harmful to the libellant's case by dismissing the paragraphs. But, in view of the fact that none of the [5] fictitious parties have been served, it would serve no purpose in keeping them in as defendants.

Mr. Gallagher: Well, if your Honor please, there is no issue raised in so far as the allegations of articles third, fourth, fifth, sixth and seventh are concerned and, if the proctor for libellant takes the position that he must designate certain people in order to state facts sufficient to constitute a cause of action, then his libel does not state facts sufficient to constitute a cause of action. And on that ground at this time the respondent, the Tide Water Associated Oil Company, a corporation, will object to the introduction of any proof upon the ground that the libel does not state facts sufficient to constitute a cause of action. If they intend to charge some specific individual as an employee of Tide Water and thus charge Tide Water through its employee with certain alleged duties, they have got to set forth who it is, or at least describe them, so that we know whom they are talking about.

The Court: Isn't that a matter of proof without allegations in the complaint? If the defendants, or either of them, are charged with negligence, or both, through their agents and servants, is it necessary to cover that feature of it by a recital in the complaint other than the general statement that these defendants, through their agents and servants, without naming them, did so and so? [6]

Mr. Gallagher: They don't do that.

Mr. Hon: Yes, your Honor; we do that in those paragraphs that they want dismissed. That is why I do not want to dismiss them. We don't know the names of the employees. That is peculiarly within the knowledge of the respondents.

The Court: In other words, this is the method, that you have named those employees, without making them parties to the litigation, is that right?

Mr. Hon: That is right.

The Court: I see nothing harmful in that if that is the purpose. However, you have designated them as respondents.

Mr. Hon: But they are also referred to as employees, your Honor. One paragraph takes that up and refers to the fact that they were employees.

The Court: Let's see. Article three—

Mr. Hon: Article three, your Honor, merely says we do not know their names or capacities, and we assert we will amend the libel by appropriate amendments. That is just merely saying we are ignorant of the true names or capacities.

The Court: You say libellant is ignorant of the true names of the respondents.

Mr. Hon: They were respondents at the time. I can change that now. It would be merely a play on words to change it and say what employees. [7]

The Court: It is your pleading.

Mr. Hon: I would be willing to stand on the pleading as framed, your Honor, and, if there is any question in that respect, I would not want to gamble the libellant's interest in this lawsuit. I would like permission, then, to withdraw the offer to dismiss and leave it as respondents, even though not served. There is no rule requiring us to dismiss.

Mr. McHose: You cannot add parties to this action as respondents, Mr. Hon, since they have not been served and brought into court.

Mr. Hon: Merely unnamed respondents, is all. There is no rule requiring that an employee be sued along with his master because the theory of respondeat superior applies.

The Court: There is no appearance here on the part of any such employee. The only appearance is on the part of the principal.

Mr. Hon: That is right and those are the only persons we are going after.

The Court: But these parties are not respondents.

Mr. Hon: Would you want me to go through them and, by interlineation, designate them properly?

The Court: I would like to know who is being sued here.

Mr. Hon: The only parties served are the two corporations who have answered.

The Court: Then, they are the only parties to this liti- [8] gation—

Mr. Hon: That is right.

The Court: —other than the libelant?

Mr. Hon: That is right.

The Court: If you wish to designate certain employees, whom you do not know at this time, if they are called to the witness stand, there is nothing wrong about the designation of John Doe but, if you designate those people as respondents when they are not respondents, I think you should straighten the pleadings out on that.

Mr. Hon: I can do that within a few minutes, your Honor.

Mr. McHose: I would suggest you can cover it very simply by striking out articles third and fourth. And you can correct article five by striking out the word

“respondent” and then make it “That at all times herein mentioned the defendant, John One, was the agent, servant” and so on.

Mr. Hon: I think that would take care of it.

Mr. McHose: And the same thing is true in article six. As I understand you, you want to leave in the allegations that someone was acting as an agent for the respondents in this action?

Mr. Hon: That is right.

Mr. McHose: You don't claim any cause of action against that person? [9]

Mr. Hon: That is right.

Mr. McHose: And you have made no service against them?

Mr. Hon: That is right.

The Court: You may work that out in the manner in which you think it should be worked out.

Mr. Hon: All right; in the recess, your Honor, or I will do that before the trial is completed.

The Court: Yes.

Mr. Hon: That would take us to article eight.

The Court: You have a fictitious named owner, John Four.

Mr. Hon: Yes. I don't think there is any question, your Honor, and is there, Mr. McHose, but what the ship was docked at the Bethlehem Steel Company's docks?

Mr. McHose: I think we can facilitate the matter, if the court please; if we can stipulate to two things; first, in so far as Bethlehem is concerned, we will stipulate that the Frank Drum was at the repair docks of the Bethlehem Steel Company at the time alleged in the complaint. We will also stipulate that it was at the yard at that place and time for the purpose of undergoing

repairs which were being effected by the Bethlehem Steel Company. I think that with respect to the Tide Water Associated Oil Company, Mr. Gallagher may stipulate and I believe he has stated in his answer that the vessel was owned at that time and place by the Tide Water [10] Associated Oil Company. Is that correct?

Mr. Gallagher: That is correct.

Mr. McHose: Now, I think there is only one other point we should clear up in connection with a part of the allegations of Article three of the answer of the Tide Water Associated. It is set up that the vessel was under charter to the United States Government. I think we ought to clear up whether the United States Government as charterer of the vessel has any interest or responsibility in this litigation.

The Court: Before we get into that, the ownership is settled. It is the Tide Water Associated. It is stipulated that that corporation is the owner of the vessel, is that correct?

Mr. Gallagher: That is correct.

The Court: And that the owner caused the boat to be taken to the dock for the purpose of repairs and that repairs were being made on that vessel?

Mr. Gallagher: As I understand it, your Honor, the vessel was being made ready to be turned over to the Navy on a bare boat charter, or the Navy was going to take it over and operate it, in any event, and, consequently, the vessel was withdrawn from navigation and remained at the shipyard until all of the work was completed.

The Court: Before we get into that, let's settle the [11] question of what was the boat doing there. The vessel was there for the purpose of repairs, was it?

Mr. Gallagher: Annual inspection, repairs and alterations.

The Court: Do you stipulate to that?

Mr. Gallagher: Yes. But I am not the only one who should stipulate. It is no good for me to stipulate all by myself.

The Court: You represent the owner of the vessel.

Mr. Gallagher: That is right.

Mr. McHose: We join in that stipulation.

Mr. Hon: Let's get the stipulation first. What was the stipulation? I didn't understand it.

Mr. Gallagher: I stipulated, or offered to stipulate, that the Tide Water Associated Oil Company was the owner of the vessel at the time this accident happened and that the vessel had been delivered to the Bethlehem Steel Company for the purpose of having alterations and repairs and inspection made. Is that satisfactory to you?

Mr. Hon: Yes; that is satisfactory.

The Court: At the time of the accident?

Mr. Gallagher: At the time of the accident.

The Court: And delivered by the owner of the vessel?

Mr. Gallagher: Yes, to Bethlehem. [12]

Mr. McHose: I can't quite join in that stipulation and I want to make it clear. One of the issues in this case will be, if you should decide that there is liability to this libellant, which Mr. Gallagher and I feel sure should not be, there is question of responsibility to be determined as between the Associated Oil Company and the Bethlehem Steel Company. And we will offer evidence to show the exact status of this ship in our yard. My objection to the stipulation as phrased by Mr. Gallagher is his statement that it had been delivered to the Bethlehem Steel Company. I will stipulate that it was

brought into the yard of the Bethlehem Steel Company: that it remained at all times—or I mean our position will be, and I wouldn't ask anyone else to stipulate to this—but I want the record to be clear that our position will be that the ship remained at all times in the possession and control of the Tide Water Associated Oil Company, and we will agree that it had been brought into our yard and was there for the purpose of undergoing repairs.

Mr. Hon: That will be satisfactory to the libelant.

The Court: That covers the stipulation that I had in mind thus far, that it was delivered, for the purpose of repairs, at the yard of the Bethlehem Steel Company.

Mr. McHose: I don't like the use of the word "delivered." That perhaps means or sounds something like you take your automobile into a garage and leave it there to be [13] repaired, which is an entirely different situation from what we have here, where the ship came into the yard but was still in charge of the Tide Water Associated Oil Company, with its own officers on board the ship.

Mr. Gallagher: The evidence will show that the ship was absolutely dead and, if they didn't have a full crew, they couldn't have done a thing with it. It is the same as taking your automobile to a garage, if you have got a trailer on it and sleep in it—

Mr. Hon: Why couldn't we have a stipulation to this effect: We accept the stipulation but the question of the control will be a question of fact for the court to determine?

Mr. McHose: That will be agreeable.

Mr. Gallagher: I prefer to let the evidence come in on that subject, your Honor.

The Court: Then, we will pass that. There is no stipulation, is there?

Mr. Hon: As I understand it, your Honor, there is no question but what the ship was owned by Tide Water and that there is no question but what it was at the Bethlehem docks for repairs. That is true, isn't it?

Mr. Gallagher: And other things; yes.

Mr. Hon: And other things. What they are I don't know. And there is no question that on the night of the accident but [14] what it was docked at Bethlehem's shipyard for repairs, and it was owned by Tide Water Oil Company, and that whoever had the control is a question of fact.

The Court: Is that agreeable to you gentlemen?

Mr. Gallagher: I think that is the situation.

The Court: Then, that may be stipulated.

Mr. McHose: The point that I wanted to clear up with respect to Article eight has to do with the allegation of the answer that at the time the vessel was under charter to the United States Government—I think we ought to be able to cover that by stipulation.

Mr. Gallagher: I have got a photostatic copy of the charter, which I am perfectly willing to have introduced in evidence, but I don't think we can cover the legal effect of the time charter in any stipulation that could be stated in a paragraph or two.

Mr. McHose: I am quite agreeable to let you show the situation but I would like to know, for the purposes of the present status of this case, whether your contention is going to be that the vessel was under charter to the United States at the time this accident happened and whether there is any responsibility of the United States under that charter so far as this action is concerned.

Mr. Gallagher: I don't think that is a point here involved. [15]

The Court: I gather from the pleadings and the particulars that are on file that this ship was being made ready for some service in behalf of the United States.

Mr. Gallagher: It already had been in the service of the United States under a time charter, your Honor. And one of the questions that your Honor is going to have to decide is whether people coming aboard the vessel during the time charter come aboard as the employees of the United States Government, if they are in that capacity, or whether they come aboard as licensees of some other entity or whether they come aboard as trespassers, so far as the owner of the vessel is concerned and so far as the shipyard is concerned. I take the position to be that it is comparable to the lease of a house. If I lease my house to your Honor and I furnish you with a cook and housekeeper as part of the lease, people who come into the house are not my invitees merely because my cook and housekeeper are there doing the sweeping and cooking. They are your invitees.

The Court: We will get to that later but in the meantime, if the charter situation is important in this litigation, we ought to determine that now.

Mr. Gallagher: I have got it here.

The Court: The vessel was under charter to the United States Government, was it?

Mr. Gallagher: That is right. [16]

The Court: And it had been prior to that time?

Mr. Gallagher: That is right.

The Court: And that charter was effective at the time in question, was it?

Mr. Gallagher: Yes, your Honor.

The Court: Even though the boat was in inactive status?

Mr. Gallagher: Yes. In other words, the charter provided, in substance, that certain work had to be done and, whenever it had to be done, it was to be done at the convenience of the owner and the charterer. There are certain laws that have to be complied with with reference to annual inspections and necessary repairs.

The Court: Of course, the United States is not a party to this litigation?

Mr. Gallagher: No. Maybe it should be.

Mr. Hon: Further along that point, could it be stipulated whose employees went on that boat at the time of the accident?

The Court: Before we get to that, let's get this charter situation out of the road. Do you want to offer that in evidence now?

Mr. Gallagher: Yes; I think I might as well.

The Court: Do you stipulate to that charter?

Mr. Gallagher: The proctor for libelant examined it. Mr. Newell came to the office and looked it over. It is in [17] four parts. I think only the first two parts have anything to do with this time involved. This accident happened in 1944 and the last two portions of the charter purport to have been executed on the 9th of January, 1945 and the 10th of January, 1946. The other two were executed prior to that time.

Mr. McHose: Can we stipulate, Mr. Gallagher, to this, that, at the time the accident happened, the time charter was in effect? I mean is that going to be your position, that the time charter was in effect?

Mr. Gallagher: The time charter; yes, sir.

Mr. McHose: And the bare boat charter did not go into effect until after the accident happened?

Mr. Gallagher: That is correct.

The Court: What is that?

Mr. Gallagher: A bare boat charter is where the owner turns the vessel over to the charterer. That means without anything excepting the vessel itself.

The Court: Do you all join in that stipulation?

Mr. McHose: I will accept Mr. Gallagher's statement on that that it is a fact. And the time charter that was in effect is the time charter which you propose to introduce?

Mr. Gallagher: Yes; that is my information. I have never seen the original.

The Court: What is the date of the time charter? [18]

Mr. Gallagher: I think the first one was April 20, 1942.

Mr. McHose: Do you know the date when the vessel was redelivered to the owner, Mr. Gallagher?

Mr. Gallagher: No.

Mr. McHose: Are you quite certain that the vessel had not been re-delivered to the owner at the time the accident happened? I think you ought to be sure of that before you stipulate to it.

Mr. Gallagher: I think so, too. I never received any information on that because it never occurred to me to ask about it. We had better let this charter business go, your Honor, until I ascertain that fact.

The Court: Very well; we will pass that for the time being. Now, as to article nine—

Mr. Hon: There is no question but what he was in the Coast Guard, is there, Mr. Gallagher?

Mr. McHose: You are going to cover that by your evidence.

Mr. Hon: We can cover that by evidence, your Honor.

The Court: There is some reference in the briefs as to the authority of a non-commissioned officer to make these inspections. Is that involved in this transaction?

Mr. Gallagher: It is indirectly. The statute provides who may board vessels for the purpose of inspecting them.

The Court: Then, we will get to that later? [19]

Mr. Gallagher: Yes.

The Court: Then, article ten.

Mr. Hon: I imagine they will want evidence on that.

Mr. McHose: I think we can stipulate that the accident occurred in navigable waters of the United States and that it is within the admiralty jurisdiction.

Mr. Hon: We will stipulate the ocean is navigable.

Mr. McHose: Well, that is an important point.

Mr. Hon: Yes; I will stipulate to it, your Honor. The rest I can offer evidence on.

The Court: Have we covered everything?

Mr. McHose: I think all of the rest of it is evidentiary. Don't you, Mr. Hon?

Mr. Hon: Yes; I think so.

The Court: Now, No. 11.

Mr. Gallagher: That is all evidentiary; in other words, there are issues on that and issues on twelve.

Mr. Hon: In article thirteen, your Honor, at line 10½, I would like to amend that figure from "35" to "36 feet 7 inches."

The Court: You state "approximately." That would cover it, wouldn't it?

Mr. Hon: Yes; I guess it would, although the testimony will show the other. I will withdraw my offer on that because I did say "approximately." [20]

The Court: Fourteenth?

Mr. Hon: Article fourteenth is a question of the injuries. I have here, your Honor, from the United States Naval Hospital one of the officers in charge of the medical reports. He has the original here. And I also have a certified copy of it, which I have exhibited to counsel, but we were looking at it at the time the court took the bench and I don't think we have come to any stipulation as to what we can do in that respect.

Mr. McHose: We can probably stipulate to it.

Mr. Hon: To let the certified copy go in?

Mr. Gallagher: So that the officer can go. And, when you say you have a certified copy, do you mean you have a three-page typewritten document? Is that right?

Mr. Hon: What I have, I will show you.

Mr. Gallagher: I have no objection to it.

Mr. Hon: Do you have any objection to it, Mr. McHose?

Mr. McHose: No.

The Court: What are you going to do with these exhibits? Are they going to be introduced as exhibits now?

Mr. Gallagher: Yes, your Honor. He has a certified copy. That is for the purpose of permitting the naval officer to go back to his duties.

The Court: Just what stipulation do you enter into with respect to this? [21]

Mr. Hon: I will state it and, if it is incorrect, I am sure Mr. McHose and Mr. Gallagher will correct me.

Could our stipulation be to this effect, that, if someone from the United States Naval Hospital were to take the stand, he would testify—

The Court: He is here now. You might as well use the name.

Mr. Hon: What is your name?

A. Mr. Hull: Ensign Hull.

The Court: You might say he is deemed to have testified whatever you are going to stipulate to.

Mr. Gallagher: I don't think so. I don't understand this gentleman ever treated the libelant personally. So all he could do is to say, "I have brought with me the original record kept by the Naval Hospital in reference to this libelant's case," and that "Here is the original and I have checked a copy of it and this is a copy of the record."

Mr. Hon: Yes. And I will ask you to stipulate that, if he took the stand, that would be his testimony. And you have no objection to the certified copy being introduced as an exhibit in the libelant's case, is that right?

Mr. Gallagher: I don't think it is even necessary for the man to take the stand. So far as I am concerned, I accept the fact that he has brought the original record and I stipulate with you that the certified copy that you want to [22] offer is a certified copy.

Mr. McHose: And I so stipulate, too.

Mr. Gallagher: I won't stipulate that he could testify to anything that happened to this libelant while he was in the hospital.

Mr. Hon: Oh, no. I will offer this certified copy as Libelant's Exhibit A, your Honor.

The Court: In accordance with the stipulation?

Mr. Hon: The stipulation. There is no objection to it being introduced, is there?

Mr. Gallagher: Not in so far as it is a correct copy of the record. I will come out of the bush and let you know exactly what my position is.

The Court: Let's not get into an argument as to the contents of that document as to which the witness cannot testify.

If you confine your stipulation or offer to this as being a certified copy of the document, as being a certified copy of the original in the files in the Navy, that is about as far as you can go with that document, I imagine.

Mr. Gallagher: Yes, your Honor.

Mr. Hon: Your Honor, if there is any question about it being read into evidence, then it would be worthless just to have the stipulation.

The Court: If it is offered in evidence now— [23]

Mr. Hon: I will offer it in evidence as an exhibit, which would entitle me to read it into the record. And I so offer it at this time.

Mr. Gallagher: Will your Honor permit us to read this? We were interrupted when we were about half way through it.

The Court: Yes.

Mr. McHose: Did you endeavor to get the X-rays in this?

Mr. Hon: Yes, and they are no longer at the U. S. Naval Hospital. He says they have been transferred to the Arrowhead Springs Hospital.

Mr. Gallagher: I have no objection to this being introduced in evidence, your Honor.

Mr. McHose: We haven't, either, your Honor. It apparently is an actual record of what the Navy treatment consisted of and what happened.

The Court: It may be received as Libelant's Exhibit 1.

Mr. Hon: And at the appropriate time I will ask permission to read it, your Honor. May I inquire from Officer Hull, your Honor, where I might be able to get the exact location of that and the name of the place?

Mr. Hull: I don't have it now. If you will call me up, I will give it to you. Call me at the Naval Hospital.

Mr. Hon: At the noon hour?

Mr. Hull: Any time. You can call me at any time.

Mr. Hon: I will call you during the noon hour and you [24] have that information for us. May this witness be excused to return to his station?

The Court: He may be excused. This is a transcript of the medical record of the United States Naval Hospital?

Mr. Hon: That is right, sir. I suppose that will take us to article eighteenth because fifteenth, sixteenth and seventeenth deal with his injuries and damages.

Mr. Gallagher: I don't think eighteenth has any materiality, your Honor, because this is a libel in personam and we have answered so far as the Tide Water is concerned. That allegation is ordinarily inserted in a libel where you are proceeding in rem.

Mr. Hon: Yes. And nineteenth you have answered, I take it.

The Court: Nineteenth?

Mr. Gallagher: We have both, of course, assumed up to now that the premises are within the jurisdiction of this court. Are you raising a question about it?

Mr. Hon: No.

Mr. McHose: We don't admit they are true.

Mr. Hon: What about twenty, transacting business?

The Court: Article twentieth?

Mr. Hon: I think that is covered. They admit they are corporations and transacting business within the jurisdiction of the court. They have given the court jurisdiction by ans- [25] swering, anyhow.

The Court: There is no question about the jurisdiction, is there?

Mr. McHose: We stipulated to that a few minutes ago.

The Court: The jurisdiction of this proceeding?

Mr. McHose: Yes.

Mr. Gallagher: If the court has no jurisdiction, neither side could confer it by stipulation.

The Court: Neither side questions that, do you?

Mr. Gallagher: I think the court has jurisdiction.

The Court: We might proceed now.

Mr. Hon: May I make an opening statement, your Honor?

The Court: Yes.

Mr. Hon: May it please the court and counsel, briefly, your Honor, in view of the type of this case and the testimony we intend to offer, I would like to give the court just a brief outline of what we expect to prove. We will show that David Richardson, on August 6, 1944, at that time about 22 years of age, was a member of the United States Coast Guard; that three or four months prior to this accident he had been assigned to the L. A. Harbor territory. He had been in the Coast Guard about two years prior to that. And his duties were to act as guard and also to inspect ships that were in the

L. A. Harbor. We will show your Honor that, on the evening of August 6, 1944, he received his orders from the officer of [26] the day, which included, among other things, to make an inspection of all the ships that were docked in the Bethlehem Steel Company's yards. We will show that—or I think the stipulation shows that the S. S. Frank Drum at that time was owned by Associated Tide Water Oil Company, a corporation, and certain repairs were being made on this boat by the Bethlehem Steel Company, a corporation. David Richardson, the libelant, received his orders at about 10 or 15 minutes before the accident and went directly to the gate of the Bethlehem Steel Company's yards and showed his I. D. card or his identification papers, signed the log, and was admitted to the yards. We will show further that, when he got to the gangplank of the S. S. Frank Drum, there was another civilian guard there that waved him onto the boat; that this young man, in performance of his duties, went aboard the S. S. Frank Drum, and, in obedience of the officer of the day or his C. O., his duties were to make a complete and full inspection of this ship, along with other ships that were docked at that place. These inspections included going over the entire ship and inspecting for fire hazards, fire extinguishers and sabotage, and, also, it was his duty to take a report from the officer in charge of the vessel.

We will show that at the time he went on the S. S. Frank Drum the only light that was lighting the entrance from the gangplank was a small light that was tied to the gangplank of [27] the vessel or right where the gangplank connects with the vessel. He entered onto the boat from the starboard or the right side of the boat at about 'midship. The boat was dark. He looked and

made an immediate search for the man in charge or someone in charge and, to all appearances, the boat appeared to be deserted; in other words, there was no one present. So he immediately went about following his orders to make an inspection of the ship and, also, if he could find the man in charge, to take his report.

After ascertaining that no one was in the vicinity of the gangplank, or he could see no one on the boat, he started out to make his inspection. In doing this, he went to the rear of the boat, which I believe they call the aft, and entered an enclosed passageway. This enclosed passageway entered from the right side of the boat. It makes a half circle around the rear of the boat or a horseshoe, and on either side of the passageway were different quarters or different rooms, which I don't believe are material to this case. The passageway was lighted. When he gets to the left side of the boat or the port side, that ends that passageway. He has made his complete half circle. So he finished his inspection in this place. There is a door leading out to 'midship from the port or the left side. Well, it is not a door. There is a passageway and the only door that is there is just a canvas flap that you pull back with your hands and step out. [28] So he reaches this left side and then he starts to go out and takes one step out into the ship where it is dark. There is a coaming or a threshold which is about eight or 10 inches high. He steps over that and then starts to go to his right along the bulkhead to inspect fire extinguishers that would be up probably a little above his head, and takes one step to his right, and, in taking that one step, he steps into a bunker hatch and falls straight down at a distance of 36 feet and 7 inches.

We will show your Honor that this bunker hatch was of the approximate dimensions of four feet by possibly five or six feet and the depth that I have stated, 36 feet and 7 inches; that it was completely dark where he stepped into it. There were no guards whatever surrounding the bunker hatch. The lid was off and had been left off two or three days; that there was no protection whatever for this young man in inspecting that ship; that the Bethlehem crew had worked on that ship and had worked on this particular bunker hatch.

This accident happened at about 9:05 p. m. on Sunday. I think the evidence will show that the Bethlehem people concluded their work at 4:00 p. m. on Saturday and that someone left the lid open, left the lid off and without guarding this bunker hatch, and that it had been in that condition several days, or at least three days, prior to this accident.

We will show that these respondents in the case knew that [29] the ship was to be inspected at regular intervals by the Coast Guard for the purposes which I have enumerated and that, regardless of their knowledge in this respect, they took no means whatever to guard the ship in this respect, for the safety of people that they knew would be on there for the purpose of inspecting it, and that it was through the joint negligence of both these respondents that this man has received injuries which we claim are permanent for life.

We will show that as to respondent Tide Water, in working this hatch, it was left open by them 29 hours before the accident happened. As to the Tide Water Associated, the two men in charge of the boat, two of the men, admitted that it had been open at least three days before the accident happened. We will have testi-

mony to that effect. We will show that the boat had a stand-by crew—I think that is what they call it—of three men. Just what their titles are I am not able to say at this time, but they had their technical titles, with a man in charge and two others. We will show they were employees of Tide Water Associated Oil Company and that they were in charge of that boat and that they were paid by the Tide Water Associated. I think as to Tide Water, it will make a perfect case of *res ipsa loquitur*.

As to the injuries, we will, of course, show that this young man fell straight down 36 feet and 7 inches and landed in a sitting position and that, as a result, he had a very [30] badly fractured femur, the biggest bone in the body, and that, for approximately nine months, he was in four or five different casts. In other words, he would have a cast on for two or three months and take it off and put on another one, a cast extending from the waist line down to the right foot, and, even after he was taken out of the casts, that he was a patient up at Arrowhead Springs, recuperating in the Hospital for the Coast Guard. And, in November of 1945, we will show your Honor that this condition was such that he was no longer fit for the Coast Guard service and they gave him a military discharge. And we will show that, as a result of this accident, since the accident, he has been unable to carry on any gainful occupation. The young man lives in Graceville, Florida; that he lives there with his wife and his two children and came here purposely for this trial. And we will show that he has a permanent partial disability that will prevent him from carrying on any particular trade. We will show that he is a young man who had finished the tenth grade and had

a portion of the eleventh grade; that, before volunteering for the Coast Guard service, he was employed as a machinist's helper and at that time was making, I think, about 88½ cents an hour; that that same work today pays about \$1.31 an hour. But we will show he is unable to carry on that or any occupation requiring labor and he will be forced to rehabilitate himself by learning something that [31] doesn't require exertion.

That, briefly, is the evidence we expect to prove.

The Court: We will take a short recess.

(Short recess.)

The Court: Do you desire to make a statement now or wait?

Mr. McHose: May it please the court, I think it may be helpful if I did make a brief statement. This is a suit in admiralty and I assume the court is familiar with the fact that there are certain differences in the law of admiralty to the ordinary law of negligence. This case is, essentially, a negligence case but, under the law in admiralty, there is one difference about contributory negligence. Is the court familiar with the comparative negligence doctrine?

The Court: You may go ahead with your statement.

Mr. McHose: I thought it might help now to explain it to you, so you will have it in mind.

The Court: I have read over your briefs.

Mr. McHose: We didn't go into this in our pre-trial memorandum. The doctrine, which is quite well established in admiralty, is simply this, that, if a person is negligent and is injured as a result of the negligence, he is not barred from recovery as he is under our California rule of contributory negligence, but the court is empowered to assess the weight or the severity of the

negligence of which the per- [32] son has been guilty and it diminishes the damages by the amount it fixes as the responsibility of that person as against the responsibility of the owner of the premises. That is one of the main points to have in mind in this case.

We are satisfied that the evidence will show that Richardson was very negligent; that the evidence will show he boarded the ship at night, on a dark night, and he proceeded to walk out on the deck of this tanker, which was in a shipyard undergoing repairs. He knew that it was undergoing repairs and yet he walked out, on a dark night, without any light, and proceeded to walk along and fell into this open hatch, which is something that is customary on board ships that are in shipyards undergoing repairs. If he had not fallen in the open hatch, he might have tripped over one of the pipelines that runs along over the deck of the tanker. He might have tripped over one of the large valves. He might have tripped over one of the hatches or might have fallen into other openings on that deck. And we believe the court will almost be able to decide, as a matter of law, that he was negligent, before this case is concluded. We believe that the court can decide that the accident was caused by Richardson's own negligence and that there was no negligence on the part of the ship or the shipyard.

The Court: Do you mean to say that, where a man boards a boat of that kind undergoing repairs, it is a negligent act [33] on his part in so doing?

Mr. McHose: Not in boarding the ship, your Honor, but he could have kept in part of the ship which was lighted, and what he did was to walk out on the dark deck of the ship, without any light. That is what the evidence will show. And Mr. Hon has outlined gen-

erally he did go through the opening out on the deck and then started to walk across, and we will show it was quite dark out there and that he came out of a lighted room and, without looking where he was going, he stepped into this opening. That will establish, we believe, negligence on his part. And, even if you should decide that there was negligence on the part of one or the other respondents, we believe you will diminish the amount of his negligence in comparison with the other negligence.

The other matter which will also be involved in this case is the rule, well established and settled by the cases for many years, that joint tort feasons may be held jointly responsible for an accident. If you should find that the Bethlehem Steel Company was negligent and you should also find that the ship was negligent, then it would be within your province and it would be customary under the admiralty law for you to take whatever damages you found, first, diminish those damages by the proportionate negligence of the libelant and then divide the balance between each of the two respondents. You have that power under the admiralty rule if [34] you should conclude at the end of the trial of this case there was negligence.

The Court: That is, it would be a separate judgment, is that the idea?

Mr. McHose: It would be a judgment against each of the parties separately.

The Court: It wouldn't be a joint judgment for both for the entire amount?

Mr. McHose: The order could be specifically that each would pay one-half of the total damages. I don't want to mislead the court by that statement to make you

think that either of us concedes that there is any negligence.

The Court: I understand. You wouldn't be here defending your client if that were the case.

Mr. McHose: That is true. I think the evidence will show that the ship was in the shipyard undergoing repairs. In doing some of the repairs, it was necessary for the Bethlehem Steel Company to send their workmen into what is known as the port bunker hatch. A bunker in an oil tanker, as your Honor probably knows, is a compartment in which fuel oil is carried. The ships supply fuel oil, which is used to make a ship go, in distinction from the ordinary cargo, although cargo is sometimes carried in a bunker hatch. It is one of the compartments on a ship in which fuel oil is carried. And some of the repairs which were being made con- [35] sisted of work on two plates in the skin of the ship and, in order to get to those plates to do welding and other work on them, it was necessary to go down into this port bunker to do that work.

Your Honor probably also knows that on an oil tanker, when work is done down in one of the compartments where oil has been carried, it is most important to have that compartment what we call gas free. It, first, must be wiped down carefully with rags and gasoline and cleaned out, and it is steamed, or, rather, I got my order wrong. It is first steamed and then wiped down and, after a time, a chemist goes down and makes a test and, when he determines that the bunker is safe for men to work in or safe for fire to be used, he issues a chemist's certificate, called a gas free certificate, and that had to be done in this case. And then, after the bunker had

been gas freed, it was most important to leave ventilation so that the air would circulate down there. If the hatch had been closed, gas would have generated and it would have been unsafe to work.

The Court: Was this work going on or had the work been completed in this place?

Mr. McHose: The evidence will show the work had not been completed. The shipyard obtained a gas free certificate on the 3rd of August and began work that day, and they had about five days' work to do the job in the bunker hatch, and [36] they worked on the ship. They worked about 10-hour shifts a day. So they worked those regular shifts, beginning on the 3rd, up to the afternoon of Saturday the 5th. Then we left the ship on the afternoon of Saturday the 5th and we didn't return to the ship to resume work until Monday morning, after the week-end was over. That was in accordance with the way in which the yard was working at that time. We left the ship about 3:30 in the afternoon on Saturday and it was at 9:30 or thereabouts on Sunday evening when Richardson boarded the ship and fell down into the bunker hatch. We feel it was customary and proper to leave the bunker hatch open for the purposes of ventilation. We also are in this position, your Honor. This accident happened on August 6, 1944, and we employed thousands of men at the shipyard and did particularly during the war. This accident suit was not filed until July, 1945, nearly a year later, and we were somewhat at a loss as far as getting evidence from people who were working on this job at the time it happened. So we have very little evidence as to what happened. We don't know who opened the bunker hatch as far as we were concerned. We had nothing to do with the

bunker hatch. We were doing no work on it. We were merely using it as a door, so to speak, or a means of ingress and egress from the bunker, in which we were doing our work; and, when our workmen left the ship on Saturday, presumably, it was open. It should have been open during all the time this work [37] was going on but I don't think we had anything to do with opening it, and we certainly wouldn't have closed it because it shouldn't have been closed. So we left it just the way it was. And then, on Sunday night, this man fell down in it. We feel there was no negligence on our part.

With respect to the Tide Water Associated Oil Company, they had men on the ship all day Sunday and that shouldn't have been closed. I say it shouldn't have been because it should have been left open for ventilation and had to be open for ventilation. The court, I think, will agree, when the trial is over, that there was no negligence on the part of the Associated Oil Company there.

But I did want to emphasize those two defenses between the admiralty law and the ordinary law, first, the doctrine of negligence and, second, the fact, if you do find negligence against the respondents, you can divide the damages between the two.

The Court: When was this lawsuit filed?

Mr. McHose: I think in July, 1945.

The Clerk: June 25, 1945.

The Court: What was this complaint that you filed in October?

Mr. Hon: That was an amended complaint.

Mr. Gallagher: They started on the law side, your Honor, and then switched to the admiralty side because of a [38] question of venue.

Mr. McHose: I think that is all I have to say, your Honor.

Mr. Gallagher: If your Honor please, I have only a few things to say. No. 1, the evidence in this case will show, I think, to your Honor's complete satisfaction, that the route which this young man chose of his own volition was over a part of the ship which nobody in his right mind would contend was a passageway or a place entitled to be walked upon. In other words, the evidence will show, without any conflict whatever, that the area 'thwartship at the place where this accident happened was cluttered up with permanent fixtures consisting of valves and valve handles, hatches and pipes of various sizes, some quite large.

And the evidence will also show, in addition to the fact that nobody would expect anybody to be walking in and about that part of the ship at all for any purpose, that this young man came aboard and walked from a place which was lighted out into a place which he knew was dark. He didn't even use a flashlight. He didn't light a match. He didn't even hesitate to give his eyes any chance to accommodate themselves to the difference between the light and the dark but immediately, on coming out of the passageway and without taking the slightest precautions for his own safety, he started walking from one side of the ship to the other. [39]

The evidence will show that he couldn't possibly have been walking in a normal manner, as your Honor would be walking along, lifting your foot off of the ground two or three inches, because it was absolutely essential for him to raise his foot off the surface of the deck at least six or eight inches in order to get it up over the coaming of this particular bunker hatch into which he fell.

So far as that particular bunker hatch is concerned, I also want to call your Honor's attention to the proposition that the ship, from the time it was turned over to the shipyard for repairs, was dead; in other words, there was no power being generated aboard the ship. It was necessary to get whatever lights were needed from shore and the shipyard furnished lights for the rooms or cabins in the ship.

At the time the ship was turned over to the shipyard, this bunker hatch was open for ventilating purposes but it was on what is called a stiff leg; in other words, the bunker hatch cover was at an angle of about 45 degrees to the surface of the deck, and it was held in that position by a piece of steel or iron which was used as a prop, and around that were ropes so that it was guarded at the time it was turned over to the shipyard.

The work that had to be done down in the bunker hatch consisted, in part, of replacing plates and repair leaks; in other words, the salt water had been leaking from the outside, [40] when the ship was loaded, into the fuel oil and that caused trouble. That was one of the things that was to be repaired.

As Mr. McHose told your Honor, the evidence will show that it was pitch black out there and that this young man knew it.

The evidence will also show this, that, as he walked along the dock, he could see this area of the ship and he knew it was not lighted. The evidence will also show he did not ask anybody to furnish him with any light. He didn't tell anybody he was going out there and it was not a place where anybody would be expected to go any more than you would expect a man, who comes

aboard a ship, to try to slide down a ventilator, one of these large open things that comes up above the deck and provides ventilation for quarters below.

I think, with reference to the balance of the case, the evidence will show that there was an officer of the vessel aboard but he was not there for the purpose of attending to anything excepting to see that the mooring lines didn't break loose. If they broke loose while he was there or became loose, he would see that they were tied up. And, if any emergency happened, like if fire broke out on the ship, he would be there to call assistance and do what he could himself to straighten the matter out. But this young man didn't go looking for anybody. He just wandered around the ship. Ap- [41] parently, he had never been on that kind of a ship before and didn't have the slightest idea where he was going or what he was doing after he got out of this passageway. And he couldn't have been looking for any fire extinguishers because there weren't any out there.

Furthermore, the evidence will show that there were at all times involved in this litigation good and sufficient catwalks and places where he was supposed to walk, when you want to go from one part of that kind of a ship to another. In other words, there was a platform which went fore and aft. If he wanted to go aft, he should walk on the catwalk, that is, where the crew walk when they want to go fore and aft. And, if he wanted to go from one side of the ship to the other, he should go on the passageway which is raised above the deck of the tanker. And, when your Honor sees the photographic evidence that we have, your Honor will come to the conclusion, I think, that the main deck of a tanker is not a place which is furnished for the

purpose of walking around upon and nobody would be expected to use that part of the vessel for that purpose.

The Court: What kind of a tanker was this?

Mr. Gallagher: Oil; fuel oil. And I guess you would call it just an ordinary tanker. Your Honor has seen them.

Mr. Hon: Shall I proceed?

The Court: You may proceed. [42]

Mr. Hon: Mr. Richardson, will you please take the stand?

DAVID L. RICHARDSON,

the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you please state your full name? A. David Lawton Richardson.

Q. Speak loud enough so I can hear you over here. How old are you? A. 24.

Q. Where do you live, Mr. Richardson?

A. In Graceville, Florida.

Q. You are living there at this time?

A. Yes, sir.

Q. And that is with your wife and family?

A. Yes, sir.

Q. Mr. Richardson, when did you first join the United States Coast Guard? A. October, 1942.

Q. 1942? A. Yes, sir.

Q. When were you first assigned to the Los Angeles Harbor area? A. In February of 1944.

Q. You first came to the Los Angeles Harbor area and [43] the Coast Guard in February of 1944?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. What detail were you assigned to in the Coast Guard when you came out here?

A. Standing watches.

Q. Standing watches?

A. Standing watches and guard detail.

Q. Standing watch and guard detail, is that right?

A. Yes, sir.

Q. And were you on that detail under date of August 6, 1944?

A. Yes, sir.

Q. And at that time who was your commanding officer?

A. Lieutenant Gregory.

Q. On August 6, 1944, what time of day or night did you report for duty?

A. 8:00 o'clock; 8:00 p. m.

Q. That would be 8:00 o'clock in the evening?

A. Yes, sir.

Q. What orders, if any, did you get from your commanding officer?

Mr. Gallagher: Just a moment, if your Honor please. I assume they would be oral if he got any orders at all. We object to that upon the ground they are hearsay so far as the respondent Tide Water is concerned. They can't place any [44] duty on the respondent Tide Water Associated Oil Company by anything that some Coast Guard officer may have said to this man or his understanding of it.

Mr. Hon: Your Honor, the point is this. I intend to show by this that this young man was ordered by the United States Government, in a time of actual war, to go aboard this particular vessel and to make this particular inspection.

The Court: You may answer.

(Testimony of David L. Richardson)

Mr. Gallagher: An exception.

Mr. Hon: Answer the question, please.

A. Please read it.

Mr. Hon: Will you please read it?

(Question read by reporter.)

A. He told me to go aboard all vessels in Bethlehem Steel and make an inspection; that we were shorthanded and didn't have enough men to go around all ships.

Q. And what type of inspection?

A. Looking for fire extinguishers, hoses, and take a report from the mate some time when I was on the ship.

Q. Any other duties? A. No other duties.

Q. Was anything said about sabotage?

Mr. Gallagher: That is objected to on the ground it is leading and suggestive and calls for a conclusion of the witness. [45]

The Court: Sustained.

Q. By Mr. Hon: Then what did you do when you got those orders?

A. I went to the Bethlehem Steel gate and showed my I.D. card and signed the log and went on in at the gate.

Q. Then, where did you go?

A. I went aboard the Frank G. Drum.

Q. And, when you got to the gangplank of the Frank Drum, did you see anyone else?

A. There was a guard at the foot of the gangplank, in a little house right close by, and he recognized me and knew what I was going aboard for and told me to go on board.

Mr. McHose: I object to that —

(Testimony of David L. Richardson)

Mr. Gallagher: I move to strike out all of the answer from and including "he recognized me and knew what I was going on board for," and so forth, on the ground it is not competent evidence so far as the Tide Water is concerned. There is no evidence proving or tending to prove that the individual was an employee of Tide Water.

Mr. McHose: In addition, it is a statement of a conclusion of the guard, which he couldn't know.

The Court: That answer may be stricken. Start all over again.

Mr. Hon: I will start all over again.

Q. There was a guard at the foot of the gangplank, is [46] that right?

A. Yes, sir.

Q. All right. Did you look at the guard?

A. Yes, sir.

Q. Did he look at you?

A. Yes, sir.

Q. What, if anything, did the guard do?

A. Well, he waved me on board.

Mr. Gallagher: That is objected to so far as the Tide Water is concerned upon the ground that it is immaterial and there is no proper foundation laid showing or even tending to show that guard was an employee of Tide Water Associated Oil Company; and, if he was, whatever he did wouldn't be binding on us.

The Court: We don't know just yet. We don't know whose guard he was. He may tell what he did. If he is not your guard, then, of course, you may not be held for his activities.

(Testimony of David L. Richardson)

Mr. Gallagher: Well, he wasn't. That is why I made the objection.

Mr. McHose: I object to that statement. He was your guard.

Mr. Hon: This young man would have no way of knowing whose guard it was.

The Court: I would like to find out what happened there and then we can determine the legal issues afterwards, after [47] we get to that point. Whatever objections you want to make, make them and they will be in the record. What is the question?

Q. By Mr. Hon: What did he do?

A. He just waved me on board.

Q. What did you do then?

A. I went up the gangplank.

Q. Then, when you went up the gangplank, did you see any lights on the ship?

A. There was a light at the gangplank.

Q. A light on the gangplank? A. Yes, sir.

Q. Was that an electric bulb? A. Yes, sir.

Q. What was that fastened to?

A. The side of the ship, the ship's shell, right at the top of the gangplank.

Q. Was there any other light?

A. There was lights on the dock.

Q. Was there any other light what you saw on the ship?

A. No, sir.

Q. When you got onto the ship, what was the first thing you did?

A. I stopped and glanced around to see if I could see anyone on deck and, not seeing anyone, I walked onto the [48] starboard passageway.

(Testimony of David L. Richardson)

Q. You say you saw no one on deck?

A. Not a soul.

Q. Then, where did you go?

A. I went in at the port passageway.

Q. Sir?

A. I went into the starboard passageway.

Q. You entered the ship, did you, from the right side or the left side A. The right side.

Q. That would be the starboard side?

A. Yes, sir.

Q. And then you say you went into the starboard passageway. Was that to the rear of the ship or to the front of the ship?

The Court: Let me make this suggestion. If you have some map or sketch that we can look at and follow this —

Mr. Hon: I think it would be a splendid idea.

Mr. McHose: There is a blueprint of the ship *here* which should be on the blackboard.

The Court: I should think so.

Mr. McHose: I think it would be helpful to the court.

Mr. Hon: I think so, very much so.

The Court: (Referring to the blackboard): You may bring that up closer so we can get a better look at it. [49]

Mr. Hon: May I inquire what time you convene in the afternoon?

The Court: Usually at 2:00 o'clock.

Mr. Hon: The reason I ask that is this, that I am going to question him on his injuries for the next 15 minutes, and the Doctor who is going to testify is ex-

(Testimony of David L. Richardson)

tremely busy and he wants to be here at 2:00, and I might be able to call him out of order.

The Court: I think that can be arranged if he gets here at 2:00 o'clock.

Mr. Hon: All right. Then, I will have to spend about 10 minutes with this young man on his injuries before the Doctor testifies.

The Court: Is it agreed that this is a blueprint of the vessel?

Mr. Hon: Is that a bird's eye view looking down?

Mr. McHose: That is a view, as I understand it, looking down at the deck of the ship. It shows the deck plan, three deck plan views.

Mr. Hon: This is the aft right here, isn't it, Mr. McHose?

Mr. McHose: Yes.

The Court: I think we should mark this at least for identification.

Mr. Gallagher: Libelant's Exhibit 2 for identification? [50]

The Court: Exhibit 2 for identification.

Mr. Hon: Your Honor, I think that he has reference to — this would be the starboard side right here and the gangplank somewhere along in here.

The Court: When you say "here," we can't get that into the record. I think what you should do is you should take a red pencil and mark these points, whatever you think are important points, so they can be identified and we can tell about them.

Mr. Hon: Suppose I take up the injuries now and, at 2:00 o'clock, I will have my doctor.

The Court: All right; you may do that.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Mr. Richardson, did you sustain an injury that night? A. Yes, sir.

Q. Just briefly, what happened?

A. When I stepped out that door, right immediately I was just gone.

Q. You fell some distance straight down, did you?

A. Yes, sir.

Q. How far down did you fall?

A. Between 36 and 37 feet.

Mr. McHose: That is the conclusion of the witness. I don't think he knows how far he fell.

Mr. Hon: The blueprint shows it; 36-7, I think Mr. [51] McHose.

Mr. McHose: I don't know that but I am willing to stipulate he fell somewhere around that distance.

Mr. Gallagher: We don't know how far down he fell.

The Court: At any rate, you fell from where you stepped off down to the bottom of where you fell, is that correct? A. Yes, sir.

Q. By Mr. Hon: And you estimate that at around 36 feet, is that right? A. Yes, sir.

Q. In what position were you when you landed?

A. In a sitting position, kind of bent over.

Q. At that time did you feel any pain?

A. I was numb. I didn't hurt so bad right then but in a few minutes I started to hurt.

Q. And what did you do when you found yourself in that position?

A. I kind of rubbed myself around my legs and arms and, when I started to rub my leg, it caved in. When I rubbed my leg, I saw it was caved in.

Q. What part of the leg was that?

A. The femur, above the knee.

(Testimony of David L. Richardson)

Mr. McHose: Which leg? A. The right leg.

Q. By Mr. McHose: All right. What did you do? [52]

A. I hollered and whistled about four or five minutes and couldn't get no answer, and I glanced up to the skyline and I could tell there was a ladder coming down in there and I crawled over to it and started climbing and got almost to the top and thought I was fixing to faint, and I stopped and hollered some more and clumb up to the top, and, by the time I got nearly to the top, three men come up and I told them to help me out, that I had broke my leg. So two of them run out and was going to get help or something and help me out, and the other pulled me on out and helped me on out, and laid me on that deck.

Q. Where were you taken, Mr. Richardson, from there?

A. They carried me on the dock and I stayed there about an hour and a half.

Q. Were you on a stretcher?

A. On a stretcher; yes.

Q. Then, where were you taken?

A. To the Long Beach Hospital, Naval Hospital.

Q. By ambulance? A. By ambulance.

Q. What was the first thing they did for you at the Hospital? Do you recall?

A. They gave me a shot and put my leg in traction.

Q. When you say "in traction," just tell us what you mean by that. [53]

A. They put a paddle around the ankle and a weight on it and let this weight hang over the foot of the bed to take the strain off of the leg.

(Testimony of David L. Richardson)

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A. On a stretcher; yes.

Q. Then, where were you taken?

A. To the Long Beach Hospital, Naval Hospital.

Q. By ambulance? A. By ambulance.

Q. What was the first thing they did for you at the Hospital? Do you recall?

A. They gave me a shot and put my leg in traction.

Q. When you say "in traction," just tell us what you mean by that. [53]

A. They put a paddle around the ankle and a weight on it and let this weight hang over the foot of the bed to take the strain off of the leg.

(Testimony of David L. Richardson)

Q. Did that keep your leg suspended?

A. Yes, sir.

Q. How long was your leg in that position?

A. From around midnight Sunday to 9:00 o'clock Tuesday morning.

Q. An then what did they do?

A. They taken me to the operating room and give me a spinal.

Q. By "spinal" do you mean an anesthetic?

A. Yes, sir.

Q. Go ahead.

A. And then they operated, opened it and put a steel plate in my leg.

Q. About how long did that operation take, do you know?

A. About an hour and a half or two hours.

Q. Is there a scar on your thigh from that operation now?

A. Yes, sir.

Q. How long is that scar?

A. Nine inches on the side.

The Court: You say "on the side."

Mr. Hon: On the side, your Honor; on the side of his [54] leg.

Q. Describe approximately where that scar is. Just tell his Honor.

A. Just about midways between the knee joint and the hip joint or a little higher.

Q. And it runs straight up and down?

A. Straight up and down; yes, sir.

Q. Has that steel plate ever been removed?

A. No, Sir.

Q. How long a plate is that?

A. Eight inches.

(Testimony of David L. Richardson)

Q. That is screwed to the bone, is it?

A. Yes, sir.

Q. After you came out of the operation — or you were conscious during the operation, is that right?

A. Yes, sir.

Q. So after the operation what did they do?

A. They put me in a cast.

Q. What kind of a cast was it?

A. A Spica cast.

Q. Is that a rigid cast like plaster of paris?

A. It was a plaster.

Q. It was a plaster cast? A. Yes, sir.

Q. Just tell us where that cast was, on what part of [55] your body.

A. From my waist down all the way on my right leg.

Q. All the way to where?

A. To my toes, and there was a band around my waist I would say 9 or 10 inches wide.

Q. Did it extend down the left leg any distance?

A. No, not any distance. It just come down to where it had been injured.

Q. Did that keep your right leg rigid? Did that cast keep your right leg rigid, where you couldn't move it? A. Yes, sir.

Q. How long did that cast remain on?

A. Six weeks.

Q. That is an approximation, is it, six weeks?

A. Yes, sir.

Q. And you were in the Long Beach Naval Hospital all that time? A. Yes, sir.

Q. Then, what did they do after six weeks?

A. They taken the cast off and put another one on.

Q. Was it just like the old one? A. Yes, sir.

(Testimony of David L. Richardson)

Q. How long did they leave the cast off when they took it off? A. About an hour. [56]

Q. And then immediately thereafter they put on another one just like that, is that right?

A. Yes, sir.

Q. How long did the second one remain on approximately? A. 14 weeks.

Q. And you were still in the Long Beach Naval Hospital at the end of that 14 weeks, is that right?

A. Yes, sir.

Q. What did they do with the second cast after 14 weeks?

A. They cut it off and put another one on.

Q. How long was the second one off before they put the third one on? A. Approximately an hour.

Q. And was the third one just like the second one?

A. Yes, sir.

Q. How long approximately did the third one remain on? A. 12 weeks.

Q. And, at the end of that 12 weeks, were you still in the Long Beach Naval Hospital as you remember?

A. At the end of that 12 weeks, I was in Arrowhead Springs.

Q. What do you mean when you say Arrowhead Springs.

A. The convalescent hospital at San Bernardino.

Q. The Naval Convalescent Hospital? [57]

A. Yes, sir.

Q. How many different casts were you in following that accident? A. Four and maybe five.

Q. Either four or five? A. Yes, sir.

Q. When was the last cast taken off of your leg permanently? A. The 29th of May.

(Testimony of David L. Richardson)

Q. May 29th? A. Yes.

Q. And the accident was August 6, 1944?

A. Yes, sir.

Q. And the last cast was taken off May 29, 1945, as you recall, is that right? A. Yes, sir.

Q. Were you in the Convalescent Hospital in Arrowhead Springs when the last cast was taken off?

A. Yes, sir.

Q. Then were you able to get around?

A. Very little before the cast was taken off.

Q. What means did you use in getting around?

A. Crutches.

Q. How long were you on crutches, Mr. Richardson, after the last cast was taken off? [58]

A. Six or seven weeks.

Q. And then, after you were able to discard the crutches, did you use any other artificial means of getting around? A. I used a cane.

Q. How long did you use a cane approximately?

A. Seven or eight weeks.

Q. When did you leave the Convalescent Hospital at Arrowhead Springs?

A. July of 1945, July 26th.

Q. And then from there where did you go?

A. I went home on leave.

Q. You went home on leave? A. Yes, sir.

Q. And when did you get back?

A. The 20th of August.

Mr. Gallagher: Back where? Home or where?

Q. By Mr. Hon: Got back where? When did you get back to Los Angeles?

A. I got back to Wilmington August 20, 1945.

(Testimony of David L. Richardson)

Q. Where did you report to when you got back?

A. I, first, reported to the district office in Long Beach and they sent me over to Wilmington.

Q. And where were you stationed at Wilmington?

A. I stayed in Company A on Terminal Island. [59]

Q. Did you have medical treatment thereafter?

A. Yes, sir.

Q. How often? A. Every day.

Q. And that would be at the sick bay, would it?

A. The sick bay at Wilmington.

Q. And what kind of treatment would they give you daily, Mr. Richardson?

A. Special exercises and light treatment.

Q. Are you still in the United States Coast Guard?

A. No, sir.

Q. Do you have a discharge from the United States Coast Guard? A. Yes, sir.

Q. What type of a discharge do you have?

A. Medical.

Q. And when did you receive the medical discharge?

A. November, 1945, November 5th.

Q. November 5, 1945? A. Yes, sir.

Q. And you are now living back in Graceville, Florida, is that right? A. Yes, sir.

Q. Mr. Richardson, prior to your going into the Coast Guard — [60]

Mr. Gallagher: Pardon me. Did your Honor intend to run beyond 12:00?

The Court: I believe not. We will suspend at this time and resume at 2:00 o'clock. We will take a recess.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.)

Afternoon Session

February 11, 1947. 2:00 o'clock.

DAVID L. RICHARDSON,

the libelant, being recalled, testified as follows:

Direct Examination

Mr. Hon: Mr. Reporter, may I have the last two questions and answers, please?

(Record read.)

Q. By Mr. Hon: Prior to you going into the Coast Guard, what was your occupation?

A. Mechanical, machinery repair and helper.

Q. By whom were you employed?

A. International Paper Company.

Q. Where? A. Panama City, Florida.

Q. Just tell us generally, in your own words, what type [61] of work you did in that employment?

A. We taken out old machinery, put new machinery in, repaired old machinery and put it back.

Q. What type of machinery?

A. Motors, electric motors, reduction gears and bearings.

Q. Did that require any lifting? A. Yes, sir.

Q. To what extent? A. Up to 200 pounds.

Q. You would have to help lift up 200 pounds?

A. Yes, sir.

Q. Now, what positions would you have to be in at different times in the day in order to do this work? I mean with respect to your body?

A. Sometimes you are climbing, laying down, painting, and all different ways.

(Testimony of David L. Richardson)

Q. And what were your earnings at the time you quit to go into the Coast Guard?

A. 88½ cents an hour.

Q. Working how many hours a week?

A. 56 hours.

Q. Now, Mr. Richardson, as nearly as you can, tell us in your own words what injuries you received in this accident?

A. A sprained back and a broke leg. [62]

Q. You say a broken leg. Do you mean the femur?

A. Yes, sir.

Q. All right. Go ahead.

A. And my left heel was bruised pretty bad.

Q. What date were you discharged from the hospital, did you say? I have forgotten.

A. July 26th.

Q. 1945? A. 1945; yes.

Q. Just a few days under a year after the accident happened? A. Yes.

Q. Tell us in your own words, Mr. Richardson, what complaints you have today that are as a result of the accident.

A. My leg hurts a lot where it was broke, when I do walking.

Q. How far can you walk without your leg hurting you? A. A couple of blocks.

Q. Where do you have that pain?

A. Right about where it was broke.

Q. And what type of pain?

A. Kind of sharp stinging pain.

Q. What other complaints do you have?

A. My back, it just hurts continuously. [63]

(Testimony of David L. Richardson)

Q. What part of your back?

A. The small part, around the waistline, the small of the back.

Q. The small of the back?

A. The small of the back.

Q. You say it hurts continuously. When did the pain in the back come on?

A. Before I was out of a cast, it was numb but when I got out of the cast is when the real pain came on.

Q. You say you are never without pain in the back?

A. Never.

Q. Is it the same pain at all times or is it worse at times?

A. It is worse at times.

Q. Tell us at what times it is worst.

A. When I do walking during the day and try to do work and bending and sitting in one position too long, it goes to hurting. For 10 or 15 minutes it hurts worse.

Q. How far can you walk without your back paining you or increasing pain?

A. A couple or three blocks.

Q. What, if anything, do you do, if you walk two or three blocks, to alleviate the pain or lessen it?

A. I can lay down and rest.

Q. Mr. Richardson, what about your right leg to-day, [64] the lower leg, as compared to how it was before you had those casts put on it? Is there any difference in your leg?

A. Yes, sir. It is swelled up bad and I have a big kind of a rupture place on it.

Q. Can you show the court that place on your leg?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. Will you do that, please?

Your Honor, I would like to have him exhibit that because it is hard to get it into the record.

(The witness exhibits.)

Q. How long has that been there?

A. It was blue and busted veins there when I first got out of the cast.

Q. Was it that way when you first went into the cast?

A. No, sir.

Mr. Hon: For the purpose of the record, I would like to state that the witness shows or is exhibiting a discolored area directly above the internal mallelus, an area about five inches in depth and about two or three inches in width. Would that be correct, your Honor? And the entire surface is described as being discolored, a bluish red color.

Q. Does that give you any pain, Mr. Richardson.

A. Yes, sir; it swells up and itches.

Q. When does it swell up?

A. During the day when I am up on it. [65]

Q. Now, Mr. Richardson, would you mind stepping down just a minute, please, down here? Is there any difference in the position of your right foot or the condition of your right foot today than there was before the accident happened?

A. Yes, sir.

Q. All right. Tell the court what the difference is.

A. My right foot turns in.

Q. Your right foot turns in? A. Yes, sir.

Q. Can you turn it out?

A. I can get it about straight.

Q. When you walk, do you walk in that position, with it turned in as now? A. Yes, sir.

(Testimony of David L. Richardson)

Q. You may take the stand, Mr. Richardson. What, if any, effect does it have upon your walking or your gait?

A. It makes me stumble a lot and it gives out on me in a hurry.

Q. You have described pain in your back, which you say is constant?

A. Yes, sir.

Q. You have described the upper leg and in the ankle, in the area you have exhibited. Do you have pain anywhere else at any time?

A. My knee gets sore. [66]

Q. Which knee?

A. My right knee.

Q. Describe the pain you have in the right knee.

A. It gets sore when I do a lot of walking; a continuous grind in there. It gets sore when it is exercised a lot.

Q. What do you mean by a continuous grind. What do you mean by "grind"?

A. It just makes a grinding sound in the joint.

Q. Is that continuous or is it just once in a while?

A. It makes that grind. It is continuous.

Q. Now, Mr. Richardson, I believe you testified you received your medical discharge November 5, 1945.

A. Yes, sir.

Q. Since that time, have you been able to do any physical work?

A. I have done a little work but very little.

Q. What have you done?

A. I have helped on the farm and worked around the house.

(Testimony of David L. Richardson)

Q. Just tell the court what type of work you have been able to help your father with on the farm and how long a time did you work without a stop.

A. I would drive a tractor maybe an hour or an hour and a half at a time.

Q. Why didn't you drive it longer? [67]

A. I can't stand the ride because my back hurts.

Q. All right. What else have you done?

A. I feed the cows and hogs and change them from one pasture to another.

Q. All right. What else? A. I help fix fence.

Q. Do you mean general chores around the farm more or less? A. Yes, sir.

Q. What effect, if any, does lifting have on your condition, your back or your leg?

A. Well, I just can't lift.

Q. How much can you lift without pain? What is the most you have lifted since the accident?

A. 30 or 40 pounds, I guess.

Q. Did that cause any pain? A. Yes, sir.

Q. Now, Mr. Richardson, after you went back to Florida, did you go back to the International Paper Company, where you had worked before? A. Yes, sir.

Q. Did you ascertain what your old job is paying at this time? A. Yes, sir.

Mr. Gallagher: That is objected to on the ground it is [68] calling for hearsay.

Mr. Hon: Your Honor, I think that this witness can testify to that. Or I can get at it in another way by saying does he know what the prevailing wage is for the type of work he was doing before.

The Court: That objection is sustained.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Then, Mr. Richardson, you did go back to the International Paper Company?

A. Yes, sir.

Q. Did you do any work there? A. No, sir.

Q. Why didn't you go back to your other job?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion and a self-serving declaration.

The Court: Overruled.

Q. By Mr. Hon: Answer the question, please.

A. Well, I answered that.

Q. No. Why didn't you go back to your old job?

A. I couldn't tend to the work. It was on concrete and heavy lifting and I just couldn't stand it.

Mr. McHose: I object to that statement as a conclusion of the witness. If he did go back to work and then that was the case, that is one thing, but, if he states that as a conclusion, without having gone back to the job, why I think that is objectionable. [69]

Mr. Hon: I don't think so for this reason. The witness has testified it required him to be in bent positions on the floor, climbing ladders, lifting up to 200 pounds.

The Court: Do I understand he did go back to work?

Mr. Hon: No; he did not.

The Court: Then, I think that is a conclusion. The objection is sustained.

Q. By Mr. Hon: Are you at this time able to do the type of work you were doing at the International Paper Company prior to the time you went into the service? A. No, sir; I am not.

Q. Why not?

A. I can't stand the concrete and my back hurts when I do a lot of heavy lifting and bending.

(Testimony of David L. Richardson)

Q. What effect does the concrete, or being on concrete, have on your leg or back?

A. It makes my back hurt worse and my leg usually goes to hurting and aching and swells up bad.

Q. Did your work at the International Paper Company require your being on concrete at all times?

A. Yes, sir.

Q. Mr. Richardson, do you know what the prevailing wage is, in the town where you were working, before you went into the service, for the type of work you were doing just prior to going into the service? [70]

Mr. Gallagher: That is objected to on the ground it is immaterial.

Mr. Hon: It goes to the question of damages and, furthermore, as I understand it in these maritime cases, the rules are considerable relaxed. I would like to read you just a short case on that — it won't take but two minutes — as my authority for it, because I think it is very important, if I may do so.

The Court: What objection is there to establishing that rate at that time, that is, before the accident occurred?

Mr. Gallagher: It goes into the realm of speculation and surmise. There is no certainty at all that this company would have hired him.

The Court: He is merely going to state the prevailing rate at the time he went into the Coast Guard.

Mr. Gallagher: No; now, after he is out of the Hospital.

Mr. Hon: I am talking about now, what it is after he got out of the hospital, to show what the man is losing by way of earnings at this time.

(Testimony of David L. Richardson)

The Court: What is the measure of damages? At the time of the accident or at present?

Mr. Hon: It is the rate he could be making.

The Court: Have you any authority?

Mr. Hon: Yes; I have, your Honor. This is taken from [71] the case *Minnesota Steamship Company v. Lehigh Valley* and so forth, 63 CCA 672.

"In the trial of an admiralty cause—"

Mr. Gallagher: What is the Federal Reporter?

Mr. Hon: 129 Federal, 72.

"In the trial of an admiralty cause, where the testimony is taken before the court, all testimony offered, though objected to, should be admitted, subject to the objection, for the benefit of the appellate court; unless so utterly immaterial and irrelevant that there can be no question of its admissibility."

As I understand, the reason that the rules are relaxed to that extent is because, on appeal, these cases are really heard *de novo*.

The Court: Is that with reference to a matter of this kind?

Mr. Hon: The admiralty cases in general.

The Court: Do you mean the doors are wide open in all respects?

Mr. Hon: Yes, your Honor.

The Court: What are the facts in that case?

Mr. McHose: Is that a District Court case?

Mr. Hon: District Court.

Mr. McHose: What Circuit?

(Testimony of David L. Richardson)

Mr. Hon: It is 63 CCA. I don't know the facts at hand, [72] your Honor. But I will give you other cases, though, in admiralty.

"The court is not bound by all the rules of evidence followed in courts of common law and, where justice requires, it may take notice of matters not strictly approved."

It even goes that far. That is the case in 261 Fed. 285. I quote these to show you how relaxed the rules are. Another case is found in 11 Fed. (2d) 466, which states, "Common law rules of evidence do not apply in suits to recover damages for a maritime tort." So, then, in a case of this nature, unless the testimony offered is so utterly disconnected with the issues of the case, as I take it, the court may accept the evidence subject to the objections of counsel. Those cases I will be glad to get for you.

The Court: What objection, generally, is there to evidence of this kind? How else are you going to prove the loss of earning power?

Mr. Gallagher: Well, your Honor, the man specified what he was doing before he went into the Coast Guard and how much he was making. That is direct evidence of a fact. I don't think in admiralty or in any other case any plaintiff is entitled to prove what a job that he used to have is paying at the time of the trial because there is no certainty, not even any reasonable certainty, that he could be working in that place. Therefore, it goes into the realm of surmise and con- [73] jecture. There is no evidence here showing that this company that he used to work for would have anything to do with him now.

(Testimony of David L. Richardson)

The Court: Suppose he had worked for himself in that particular line, that that was his vocation before, and he is prevented, we will say, from doing that type of work, which at the present time is worth so much.

Mr. Gallagher: You might have the converse of it. Suppose wages went down in the meantime. I don't think any court would permit you to prove the wages had been reduced.

Mr. Hon: It would be a matter of defense, your Honor, in mitigation of damages, if they had gone down.

Mr. McHose: My feeling in this matter is that it is very speculative evidence. I grant, Mr. Hon, that the rules of evidence are somewhat relaxed in admiralty and the court is not required to be as strict about the admission of evidence as on the common law side of the court. The cases that he read are not cases that go to the question of the evidence which is here before your Honor. I think it is highly speculative and immaterial for that reason. And the court can decide, if you should decide that damages should be awarded in this case, what the damages might be, and I don't think it is going to help you to know what wages might be paid in some industry back in Florida, in which he might or might not be working if he hadn't been injured. [74]

The Court: We will see if it is speculative or not. Here is a man who says he was injured and, as a result of those injuries, he is unable to carry on his accustomed work and he says he was permanently injured, or practically so, in that respect. How are you going to determine whether or not he is able now to carry on the work? Suppose that he is able to do part-time work at this time. He certainly ought to be able to show what he would be able to earn at this time if he carries on part-time work

(Testimony of David L. Richardson)

in a similar line or if he is able to do part-time work. I think it is admissible for that purpose. Will you answer the question, Mr. Richardson?

A. Ask it again, please.

Mr. Hon: Will you read the question, Mr. Reporter, please?

(Question read by reporter.)

Q. In other words, what are the prevailing wages today for that same type of work?

Mr. McHose: May we ask the witness a question on voir dire?

The Court: Yes; you may.

Q. By Mr. McHose: What did you do to try to find out what wages you were being paid when you went back there?

A. I went to my old boss and millwright foreman and talked to him. [75]

Q. And your information then is based upon a discussion you had with someone in this company?

A. My boss; yes, sir.

Q. And what did you ask him?

A. I asked him what the old job I had was paying now.

Q. Did you tell him that you wanted to take your old job back?

A. I told him I would like to take it.

Q. You did want to take it back? A. Yes, sir.

Q. Your information, then, is based on just what he told you?

A. There were two or three more old guys that was there when I was, that I asked, and they told me the same thing he did.

(Testimony of David L. Richardson)

Mr. McHose: I think that evidence would be objectionable as hearsay, if that is the case, your Honor.

Mr. Hon: Your Honor, he brought out the hearsay and I think it is certainly admissible.

Mr. McHose: He is basing his testimony here on a situation which we obviously cannot check and have no means of testing and making a statement based entirely upon what someone told him, which I think is hearsay and inadmissible.

The Court: How else are you going to establish a prevailing wage except what he is able to ascertain from others who [76] are working in similar capacities and what the former employer might say in the matter, even though it may be, from one point of view, hearsay? He is not detailing conversions.

Mr. McHose: If it is important to establish, your Honor, and prove what it is and give us the opportunity of cross examination. That is the reason for the objection of hearsay. But we have no means of checking whether the statement he makes here in court is correct or not, and I think we are entitled to stand on our hearsay objection.

Mr. Gallagher: There is also another reason for it, your Honor. We all know, as a matter of common knowledge, that most industries have become unionized to a greater extent in the last three or four years than they were before the war. If this man should be required to join the union in order to get that job, that would be something we could ascertain from the employer if we took the employer's deposition. We could also ascertain whether he could become a member of the union. Sometimes they can't get into these unions and,

(Testimony of David L. Richardson)

if they don't belong to the union, they can't get a job. It is all speculative and we have no way to test it. We can't cross examine this man on any subject connected with what somebody told him. Therefore, he shouldn't be permitted to repeat hearsay or information based on hearsay.

The Court: You can rebut with evidence that is available to you. [77]

Mr. Gallagher: How can we do it here, your Honor? Here is a conversation in Graceville, Florida. How do we know that the man is even alive today or, if he is alive, if he is there? I don't think that parties to a civil suit should be compelled to fly to Florida to check up on whether or not this man is telling the truth or not.

Mr. Hon: Of course, your Honor, you have got one other situation. I think the court will take judicial notice of this fact, that any veteran leaving the service is entitled to his old job back that he would have had had he stayed on the job.

Mr. McHose: That has nothing to do with the point we are making. Our sole objection is that this is an attempt to introduce evidence by hearsay. If the evidence is important, and I don't think it is, you could have gotten the evidence by going direct to the employer and obtaining testimony as to what the rate is. But they haven't done that and now they are attempting to get this testimony into this record by hearsay testimony, and we feel that is definitely contrary to all the rules of evidence.

Mr. Hon: We only have this situation in that respect, your Honor. He went back to his old job back and found out he wasn't able to take it back, and he can

(Testimony of David L. Richardson) •

at least say what the job is paying. That is all I am asking.

The Court: At least it is admissible for the purposes [78] stated by the proctor for the libelant. He states, if that is the situation, that the appellate courts have held that, if information is required —

Mr. McHose: If you analyze those cases, your Honor, you will not find that they go that far and that, also, it is quite true in admiralty, as in any other branch of the law, hearsay testimony is not admissible. It is not proper or right to subject us to the position of having to submit positive testimony.

Mr. Hon: I would like your Honor to read that case, if you want to reserve your ruling on the objection.

The Court: I will let the evidence go in subject to your motion to strike after I have given the matter some more consideration.

Q. By Mr. Hon: What does the same job pay now in that vicinity? A. \$1.31 an hour.

Q. Now, I will ask one other question which I am sure there will be no objection to. You don't work 56 hours at \$1.31, do you? You only work 40, is that right? A. Only 40 hours.

Q. You found that out, didn't you?

A. Yes, sir.

Q. Mr. Richardson, how is the pain in your back today compared to what it was when you received your medical dis- [79] charge from the service?

A. I would say it is twice as bad. I can't walk or do no work at all hardly now.

(Testimony of David L. Richardson)

Q. How does the condition of the leg compare to what it was when you left the service?

A. It is swelled up worse than it did and it is always breaking out.

Mr. Hon: Is Dr. Molony in the court room? Could I call the doctor now?

The Court: Yes.

Mr. Hon: You may step down.

The Court: Have you any objection to his being called out of order?

Mr. Gallagher: I have no objection.

Mr. McHose: No objection.

WILLIAM R. MOLONY, JR.,

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you please state your name?

A. William R. Molony, Jr.

Q. What is your business or occupation, Doctor?

A. Physician and Surgeon; MD.

Q. Of what school or schools are you a graduate?

A. I graduated in medicine from St. Louis University. [80]

Q. What year? A. 1927.

Q. What degree or degrees do you hold?

A. I hold a B.S. and M.D.

Q. B.S. stands for Bachelor of Science and M.D. for Medical Doctor? A. That is right.

Q. Did you serve an internship? A. I did.

(Testimony of William R. Molony, Jr.)

Q. Where did you serve your internship?

A. In the Santa Fe Hospital at Los Angeles.

Q. How long an internship did you serve?

A. I had a year's internship and several months of residency.

Q. Are you admitted to practice your profession in the State of California? A. I am.

Q. When were you admitted? A. In 1927.

Q. Have you practiced your profession continuously in California since that date?

A. Yes, except for my military service.

Q. Has that been in Los Angeles County?

A. In Los Angeles County.

Q. You speak of your military service. Will you please [81] tell the court what military service you are referring to?

A. I was in the United States Navy.

Q. In this last war?

A. In this last war, from March 27, 1943, until June 1st of 1946.

Q. And what was your rank, sir?

A. I entered as a lieutenant commander and finished as a full commander.

Q. And what particular branch of the Navy were you attached to?

A. I was in the Medical Department. I was in the orthopedic department of the United States Navy. I acted as an orthopedist all during the war.

Q. Doctor, do you specialize in your profession?

A. I do.

Q. What is your specialty?

A. Orthopedic surgery.

(Testimony of William R. Molony, Jr.)

Q. For how long has that been your specialty?

A. Since 1932, I have devoted my full time to that work.

Q. When you say orthopedic surgeon, will you tell the court, in layman's language, what that means?

A. It means the care and diagnosis and treatment of bones and joints, and their associated membranes. My work covers or is chiefly traumatology, taking care of the results [82] of trauma, and by that I mean fractures and severe injuries to tissue. Also, we take care of disabilities that result from deformities such as follow poliomyelitis and the technical care of congenital deformities, such as club foot. I think that covers it.

Q. Doctor, where were you stationed during your period with the United States Navy of service?

A. That is a long story.

Q. Then, I will be more specific. Where were you stationed in August of 1944?

A. I was at the Long Beach Naval Hospital. I was assistant chief of the orthopedic department at Long Beach, California.

Q. During your —

A. Or in 1944, did you say?

Q. 1944.

A. In 1944, I was stationed over in Pearl Harbor at the Naval Hospital there.

Q. And when did you come back to the States from there?

A. I came back to the United States March 1, 1945.

(Testimony of William R. Molony, Jr.)

Q. Did you, while you were in the United States Navy, have occasion to examine David Lawton Richardson, the young man who just left the witness stand?

A. I did; yes. [83]

Q. And you saw him in a professional capacity, I take it?

A. I did; yes.

Q. Where was he when you saw him?

A. At the Long Beach Naval Hospital.

Q. And do you know when it was you saw him?

A. September 15, 1944, was the date.

Q. You have seen the medical record that I gave you a copy of, is that true?

A. I have; yes.

Mr. McHose: Do you refer to a transcript?

Mr. Hon: Yes. His name appears on there.

Q. How many times did you see him?

A. I saw him, in consultation, on that day.

Q. And you were in consultation with whom?

A. I can explain it this way. Men, in various units, having something which their respective medical officers feel is beyond their capacity for diagnosis or treatment, are sent to institutions such as the Long Beach Naval Hospital for consultation and examination and recommendations for treatment. Also, they frequently are sent there for diagnosis. And it was in that capacity that I saw Mr. Richardson.

Q. What was his condition. What did you observe in his condition at that time?

A. What is that, sir? [184]

Q. What was his condition? What did you find him suffering from at that time?

A. He came in complaining of his right leg and his back and X-rays were taken at that time.

(Testimony of William R. Molony, Jr.)

Q. What is that?

A. I say we took X-rays at that time that he came in and found that he had a fracture of the right femur, which was healed and held together by a plate. The plate was in good condition.

Q. What is the approximate size of that plate?

A. I really couldn't tell you. It is about an 8-holer.

Q. 8-holer?

A. Well, I would say it is about a 6-inch plate that is used on the femur.

Q. And what type of plate is it?

A. That was a vitallium type of plate.

Q. That is metal, is it? A. Metal; yes, sir.

Q. What is the plate fastened to?

A. The plate is fastened to bone.

Q. By what means?

A. Of metal screws of the same material, vitallium. In this particular case I believe there were seven screws.

Q. I believe you testified he was complaining of pain at that time in the leg and the back? [85]

A. Yes.

Mr. McHose: May I get this date again?

A. Yes, sir; September 15 of 1945. At that time we took X-rays and we found this fracture to be well healed and, on further examination, I found that he had an atrophy of his right thigh of about an inch and a half.

Q. What do you mean by atrophy?

A. Atrophy means that there is a decrease in the average size of his thigh. In other words, the muscles by lack of use or for other reasons are not as well developed as they would be under normal circumstances. Therefore, the circumference of the thigh at that point is less than

(Testimony of William R. Molony, Jr.)

the normal, assuming that the other side is a normal thigh, on the opposite side.

Q. You didn't give him any treatment, did you?

A. No. I examined his back at that time and I found that he had a very tight and tense back and tender. I made a diagnosis at that time that he had a chronic lumbosacral myofasciitis or fasciitis. I don't remember exactly what the diagnosis was. I would have to refer to that transcript of record.

Q. Doctor, what recommendations did you make?

A. I recommended that he be given some stretchings and some exercises and these were given to him for a period of about one week, and he felt that he had learned how to treat [86] himself and he told the Chief in our stretching and exercise department that he was better. So he was allowed on his own and I had no further connection with his case until the other day.

Q. You examined him again, at my request, one day in the last week or so, did you?

A. I did on February 15th.

Q. Doctor, at that time you had X-rays taken, did you not?

A. I did.

Q. Have you those with you? A. I have.

Mr. Hon: Your Honor, may we have a shadowbox, please?

The Court: Do you need it?

Mr. Hon: If we don't have it here, I don't think we do.

Q. Do you have the X-rays? A. Yes, sir.

Q. How many X-rays were taken?

A. There are two X-rays here.

(Testimony of William R. Molony, Jr.)

Q. Just take one out at a time now.

The Court: Will you have them identified first?

Mr. Hon: Yes. Let me take this one. I will offer for identification, as Libelant's Exhibit 3, this X-ray, and the next one I will offer as Libelant's Exhibit 4 for identification. [87]

Q. Handing you Exhibit 3 for identification, I will ask you if that is one of the X-rays that was taken last week.

A. Yes; this is an X-ray of Mr. Richardson that was taken last week.

Q. Doctor, what portion of the body does that reflect?

A. This is a picture of the right femur.

Q. And from what view?

A. This is a lateral projection.

Q. The lateral view? A. Yes.

Q. Is there anything unusual about that particular X-ray, Doctor? What does it reflect? Just show it to the Judge.

A. This is the lateral view and it shows a metal plate extending along the mid half of the femur, the right femur, and through the central area. At the plate there, there appears an old healed fracture. In this view, it is in relative coalignment. It has some increase in the cortical substance of the bone.

Q. Is there angulation shown in that picture?

A. Not in this view.

Q. Will you hand that to his Honor and let him inspect it, please? What was the date that was taken, Doctor? A. February 5, 1947. [88]

Mr. Hon: I offer that as Libelant's Exhibit No. 3.

The Court: It may be received.

(Testimony of William R. Molony, Jr.)

Q. By Mr. Hon: Now, I hand you Libelant's Exhibit No. 4 for identification and ask you if that portrays any portion of the femur of Richardson.

A. This —

Mr. McHose: May we see it, please?

Mr. Hon: I am sorry I didn't show it to counsel.

Q. Disregarding the last question, Doctor Molony, what view is this X-ray taken from?

A. This is what is known as the anterior-posterior projection of the right femur.

Q. Is that from the front to the back?

A. Yes; that means taken from front to back. Anterior means front and posterior back.

Q. And "lateral" meant sideways, didn't it?

A. Yes. Included, also, was a portion of the pelvis and the sacrum, which is incidental in the picture, I believe. This picture here shows the same plate and screws that I mentioned in the lateral view. There is a fracture, a healed fracture, well healed, through the mid portion of the femur, the plate bridging the fracture area. The plate is held by seven screws. There is no evidence of any pathological changes around the plate or the screws. In the area of the fracture site and on the medial surface of the femur, [89] an osteoma is formed.

Q. What is that osteoma?

A. Osteoma is an outgrowth of cortical bone.

Q. Just show his Honor what the osteoma is on that. You can mark that with an "X."

A. It is the outgrowth of bone which you see at this central area of the femur, which is called an osteoma.

(Testimony of William R. Molony, Jr.)

Q. Is that an increased bone formation?

A. It is an increase in the bone formation, just as the word says.

Q. How much increase is there there, Doctor?

A. This is approximately an area of one inch by, I would say, half an inch because there is some magnification there. This osteoma is in the direction of the eductor tendon and attaches to the bone in that area.

Q. What, if any, effect does that have on the patient?

A. As a result, it doesn't have any particular effect. I personally can't say too much about this because there hasn't been enough time elapse yet to say this is a result of his fracture.

Q. Where is it with reference to the fracture site?

A. It is at the area of the fracture site. I do not believe that it was a subperiosteal hematoma which had been calcified.

Q. Do you have a professional opinion as to the cause [90] of the osteoma?

A. I have no professional opinion of the cause of the osteoma because I have no previous X-rays to go by and can't say whether he had this before or it came as a result of the accident.

Q. You don't recall whether it was on the X-rays taken before?

A. No; I don't. I studied over the previous X-ray reports and I could find no mention of this growth, bony growth, in those reports.

Q. If there were no—or, if that didn't show in the original X-rays, would you have a professional opinion?

A. Well, yes; I would have an opinion then, if such were so. These particular growths usually take place

(Testimony of William R. Molony, Jr.)

in the plane of the third part of the tendon and eventually they become capped with cartilage and, if so, then their terminology is changed and, instead of an osteoma, it is called an osteochondroma. The osteochondroma then becomes covered with a bursa. A bursa is a proposition just like the alemite systems in automobiles. Occasionally this bursitis which results becomes the site of pain, and, if such occurs, then the growth must be removed surgically.

Q. Doctor, is any angulation shown in that picture?

A. Yes; he has a few degrees, not very many. He has, I would say, anywhere from three to four degrees of lateral [91] angulation at this point.

Q. At what point?

A. Starting at the site of his fracture and then a slight angle takes place in this one, this leg being in slight allocation in this picture.

Q. And what, in your opinion, is the cause of that angulation?

A. That is the way the bone grew together after the fracture.

Q. Does that have any effect on his walking or the position of his knees?

A. In this particular case, he has a slight — in my examination of this chap, I found that he had a slight varus of the right knee, which means a bow leg.

Q. And what is the cause of that?

A. Well, I think that is due to this fracture.

Q. The angulation?

A. I think that the varus that he has in the right knee and leg, compared to an examination of his left, is due to his fracture.

(Testimony of William R. Molony, Jr.)

Q. Did you examine his right foot?

A. Yes, sir; I examined his right foot.

Q. Was there anything unusual about his right foot?

A. The right foot turns inwards. The forefoot turns inwards and also his heel has a tendency towards turning in- [92] wards. Examining his walking, he walks on his right foot different from his left and he tends to put more of his weight on the outer side of his right foot than he does on his left foot. On examining his shoe, one can see where he wears out the outer side of his toe and heel much more so on the right than on the left.

Q. And what is your professional opinion, causing a toeing in of the right toe or heel?

A. I believe that is a result of his injury.

Q. Doctor, take the stand again, please, and let me have that X-ray, please.

Mr. Hon: I offer that Libellant's Exhibit No. 4 for identification as Libellant's Exhibit 4 in evidence.

The Court: It may be received.

Q. By Mr. Hon: Doctor, did you take any history of complaints from the man? A. I did.

Q. What complaints, if any, did he make?

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and wouldn't be the evidence of any fact.

Mr. Hon: Your Honor, the Doctor has to determine and take all of the facts from the patient in order to make his examination.

The Court: Isn't that shown on the report, the history of the case? [93]

(Testimony of William R. Molony, Jr.)

Mr. Gallagher: I think what Mr. Hon is asking now is what did the libelant tell the Doctor a few days ago when the Doctor examined him.

The Court: You want to introduce that for what purpose?

Mr. Hon: Your Honor, this Doctor had to have some basis for making the examination.

Mr. Gallagher: The rule in the federal court is different from the rules in the State court in that respect. That is one of the two things of which I am sure. The Circuit Court of Appeals has held definitely that history given to a doctor, who is employed not to treat a patient but merely to examine him, is not admissable in a personal injury case.

The Court: That it is not admissible for the purpose of arriving at any facts relative to the injury. But what about for the purpose of the conclusions of the doctor? Isn't he required to get the history?

Mr. Gallagher: If we want to ask him about the history, that is up to us, but, if they want to ask him about it, I don't think they can do that.

The Court: If you can ask him for an opinion in connection with the injury —

Mr. Hon: I was leading up to that.

The Court: — I don't see why he can't ask him what basis he took into consideration when he formed the opinion.

Mr. Hon: Let me get at it in another way, your Honor. [94]

Q. Did you take a history from the patient?

A. I did.

(Testimony of William R. Molony, Jr.)

Q. Doctor, based on your findings and your examination, can you give us a professional opinion as to whether or not this man is suffering from pain in his back?

A. Yes; it is my firm opinion that he is suffering with pain in his back. I base that also on a previous examination a long time back.

Q. And what about the leg there at the fracture site?

A. I can't particularly tell just how much pain he is having in his leg.

Q. Did he give you a history of pain?

A. He did.

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and is not competent evidence of any fact.

Mr. Hon: All parties are present in court, and he can examine Richardson and the Doctor. I thing a doctor in arriving at a professional opinion has to take the patient's complaints into consideration.

The Court: You may ask him what the opinion was and you have a right to cross examine him upon what basis he formed that opinion or what facts he took into consideration.

Mr. Hon: Is the objection overruled, your Honor?

The Court: Overruled.

Q. By Mr. Hon: Answer the question, Doctor. [95]

A. I am getting a little behind here. What is the question?

Q. By Mr. Hon: Will you read the question, Mr. Reporter?

(The reporter read the following: "Q Doctor, did you take any history of complaints from the man?

("A. I did.

(Testimony of William R. Molony, Jr.)

(“Q. What complaints, if any, did he make?”)

Mr. Gallagher: May the record show the objection before the answer he gave? The witness answered simultaneously.

The Court: I thing you should go a little farther than that, and find what history, before the Doctor can give his opinion.

Mr. Hon: Yes.

The Court: That objection may be sustained and you may ask another question.

Mr. McHose: May the answer be stricken out?

The Court: The answer may be stricken.

Mr. Hon: Maybe I didn't understand your Honor.

Q. What history did you take from the patient?

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and wouldn't be substantive evidence of any fact in issue in this case.

Mr. Hon: I will get at it in this way. Doctor, based [96] upon your examination of this patient, in your professional opinion, does he or does he not have permanent disability?

A. Yes; he has, in my opinion, permanent disability.

Q. And can you give us your opinion as to what percentage it is?

A. In my opinion, he has 30 per cent permanent-partial disability.

Mr. Hon: You may take the witness.

(Testimony of William R. Molony, Jr.)

Cross Examination

Q. By Mr. McHose: Doctor, Molony, you testified that you examined Mr. Richardson, in Long Beach, on September 15, 1945. Was that an official examination while he was in the Long Beach Naval Hospital?

A. No; that is an official examination while he was attached to his unit.

Q. And he was no longer in the Naval Hospital at Long Beach at that time, is that it?

A. He had been returned to duty a few months before that.

Q. The reason I asked the question was because there was introduced a medical record of the Naval Hospital this morning, which carried down to some time in 1945, at which date he was transferred apparently to the Arrowhead Springs Hospital, and there is nothing in here that shows the examination you made. [97]

A. That is a transcript of the hospital chart herein.

Q. This is a transcript of the medical record?

A. What Mr. Hon has is his medical record.

(Inaudible conversation between counsel.)

The Court: Do you intend your conversation for the record?

Mr. Hon: No, your Honor. This is just trying to help counsel.

Mr. Gallagher: If your Honor is going to take a recess, this might be a good time to do it.

Mr. Hon: I would rather get through on account of the Doctor's time.

The Court: Yes; we will continue for the time being.

Q. By Mr. McHose: Dr. Molony, Mr. Hon has handed me a photostat of a medical history, which he

(Testimony of William R. Molony, Jr.)

indicates covers a report made by you. Do you recognize that report?

The Court: Did you have that document identified?

Mr. McHose: I didn't intend to put it in evidence, your Honor. I thought I would simply read from it into the record, if the Doctor identifies it.

Mr. Hon: I have no objection to the whole thing going in Mr. McHose.

Mr. McHose: I thing it might unduly complicate the record in view of the fact you have put the other document in. There are only about four or five lines that cover this exam- [98] ination.

Mr. Hon: Whatever you want.

Your Honor, so I can clear it up in your Honor's mind, this is a photostatic copy of the actual records at the Naval Hospital. This morning, when I had this certified copy from them, I was, frankly, under the impression that this contained everything that this has.

The Court: You mean that the exhibit now in evidence contained it?

Mr. Hon: Yes, sir; and apparently the exhibit I put in evidence only goes down to January 5, 1945. They have apparently omitted to put the rest in. I don't know why. But this is his complete medical record that takes it right on up to the time he got his medical discharge.

The Court: Why don't you introduce the whole thing?

Mr. Hon: I would be very glad to.

Mr. McHose: If the court please, I thing the Doctor here can identify the portion of the record he knows about himself and that is why I thought we could identify that, read it into the record, and then you will have a record that has been identified. We don't want to let you put in other photostats without some kind of identification.

(Testimony of William R. Molony, Jr.)

Mr. Hon: The only thing I could do would be to call the men back up here.

A. May I see the other one, Mr. Hon? [99]

Mr. Hon: This is more clear.

A. There is something cockeyed here.

Mr. Hon: I am going to have to straighten out another thing, Mr. McHose.

The Court: Let's take care of one thing at a time.

Mr. Hon: I have mislaid the court exhibit.

The Court: What is it you wish to do?

Mr. Hon: I shouldn't have said that that included this. This, your Honor, is the hospital record I introduced this morning. What the Doctor is looking at now is the medical record, which is separate and distinct from the hospital record. I have got the medical record from Washington, D. C., and I have a letter accompanying it from Washington, D. C. That is his complete record while he was in the hospital, which I would be glad to introduce with this letter, showing it came directly from the United States Coast Guard and signed by T. LeBlanc, Lieutenant Commander, U. S. Coast Guard.

The Court: You might submit it to counsel.

Mr. Hon. I had no way of subpoenaing it because that is in Washington, D. C., as I understand.

Q. By Mr. McHose: Dr. Molony, you have now examined the photostat which Mr. Hon has shown us and, as I understand it, this is a report which followed the examination you made of Richardson, which you said was on the 15th of September, [100] 1944, but which you now wish to correct to September 15, 1945?

A. That is right.

(Testimony of William R. Molony, Jr.)

Q. And this report simply shows the following: 1½ inch atrophy of the right thigh. That is what you testified to, isn't it? A. Yes, sir.

Q. Scoliosis fascial tightness throughout?

A. That means the lumbo sacral back.

Q. There was a tightness of the back muscles, is that what you mean? A. Yes, sir.

The Court: I don't think we are getting this record in very good shape. If you have a page that you desire to extract from that record, or whatever you wish in evidence, we ought to have that in the record so we know what your questions are directed to, so far as this record is concerned.

Mr. Hon: I have no objection to removing that page and putting that in.

Mr. McHose: I don't want to put in portions of the record that haven't been identified.

The Court: There was submitted a letter a moment ago. You might examine that and see if you are willing to consider admitting the entire transcript.

Mr. McHose: We don't want to be difficult about it. [101] It may go in. But I still want to read to your Honor what the page here says. I goes on to say, "Impression: Weak muscles in right leg and limp have combined to produce abnormal strain, leading to fascial tenseness. R." — does that mean Recommendations?

A. Yes.

Mr. McHose: "Stretchings and exercises."

Q. And you recommended that that is what should be done to correct this condition, is that it, Doctor?

A. That is my recommendation for his back pain at the time.

(Testimony of William R. Molony, Jr.)

Q. But you don't know what did actually occur in the way of giving that treatment after that time, do you?

A. No. That was out of my hands after that.

Mr. McHose: Do you wish to introduce this?

Mr. Hon: Yes; I would like very much to.

Mr. McHose: As Libelant's Exhibit 5?

Mr. Hon: Exhibit 5. And I will introduce the letter with it. Will you attach this as part of the exhibit?

The Court: Is there any objection?

Mr. Gallagher: No; we make no objection.

The Court: You read from what page of that exhibit?

Mr. McHose: We read from a page which is not numbered and which is the third from the last.

The Clerk: They are numbered in the upper right-hand [102] corner.

Mr. McHose: Page 16, I guess it is.

The Court: It may be received as Libelant's Exhibit 5.

Q. By Mr. McHose: Doctor, so far as the leg is concerned, would you say that there is a good recovery from this accident, from the fracture of the leg?

A. There was a good healing of the bone.

Mr. McHose: I think that is all.

Mr. Gallagher: No questions.

Mr. Hon: May this witness be excused, your Honor?

The Court: Yes.

A. Is that all?

The Court: That is all, Doctor. Thank you.

Mr. Hon: Are you going to take a recess, your Honor?

The Court: We will take a recess for 15 minutes.

(Short recess.)

The Court: You may proceed.

Mr. Hon: Mr. Richardson, take the stand again.

DAVID LAWTON RICHARDSON

the libelant, recalled, was examined and testified further as follows:

Direct Examination (Resumed)

Mr. Hon: Mr. Reporter, would there be any way you could find the last two answers, about a quarter of 12:00, before I started on the medical?

Mr. McHose: You were talking about the blueprint. [103]

Mr. Hon: Oh, I believe the court asked us to use a blueprint.

Q. Mr. Richardson, do you understand this center blueprint?

Mr. McHose, this being your blueprint, am I correct in saying that the bottom part is starboard?

Mr. McHose: Well, obviously, in that diagram that is the rear, end side or the starboard side of the ship.

Mr. Hon: And the left of the map is the aft end, is that right?

Mr. McHose: It is the stern.

Mr. Hon: And this center of the blueprint is a bird's eye view of the ship, is it?

Mr. McHose: I believe the center is the main deck plan.

Mr. Hon: Do any of you men know?

Mr. McHose: I have no marine architects here. It is obvious that the outline in the center of the blueprint is the main deck.

The Court: Have you any photographs that might simplify the illustration here?

(Testimony of David L. Richardson)

Mr. Gallagher: We have no photographs of this passageway and whatever he wants to ask him about now. We have some photographs of the part of the ship where the accident happened.

Mr. McHose: I would be willing to stipulate that the [104] center diagram is the plan of the main deck of the ship, on which this accident occurred.

Mr. Hon: If it is your understanding, it is sufficient, Mr. McHose.

Mr. McHose: Yes; that is my understanding.

Mr. Hon: And yours, Mr. Gallagher?

Mr. Gallagher: Yes.

Mr. Hon: And, Mr. McHose, it is your understanding that the covered passageway at the aft starts on the starboard side at this point and leads around to the port side?

Mr. McHose: I don't know just how it leads around but I do understand that the passageway, which goes alongside the various rooms in which the ship's personnel lives, is this passageway which is indicated here; and some place in the after end I think there is an opening where you can cross over to the other side and come down the port passageway, which is a similar passageway, to which the various rooms open.

Mr. Gallagher: There is only one correction that should be made. The quarters along the starboard passageway are the quarters of some enlistment personnel; also, the quarters of any officers that are in the engine department or the deck department.

Mr. McHose: On the same side, on the port side, apparently. [105]

The Court: What are we trying to arrive at?

(Testimony of David L. Richardson)

Mr. Hon: My only purpose in *bring* that out was to show the course he took.

The Court: If you are going to do that, get a red pencil and illustrate the steps he took from his boarding the vessel until the time of the accident.

Mr. Hon: I am not introducing this, your Honor. I think he can just say, your Honor, without any trouble, the course he took.

The Court: He can show it to me but what will you have in the record?

Mr. Hon: I think I can sufficiently describe it for the record.

Mr. Gallagher: I think your Honor's suggestion is the only sensible one. Let him take a red pencil and outline his course on there.

Mr. Hon: That is all right. The only trouble is I haven't a red pencil.

The Court: Which would make the best impression?

Mr. Hon: White would be much better in color than this.

Q. Now, take that blue pencil, and, this being the starboard side of the ship, — do you understand this map? A. Yes, sir.

Q. And, this being aft, show approximately where you boarded the ship. Put an "X" approximately where you stepped [106] on the ship from the gangplank.

The Court: Mark it "X-1."

Q. By Mr. Hon: Yes; mark it "X-1." Mark it heavy. Mark it real heavy, with an "X" and bigger than that. All right. Now show the course you took in getting

(Testimony of David L. Richardson)

to the covered passageway that you state you entered from the starboard side. Just draw a line leading to it.

A. May I say something?

Q. If it is to clear up anything, yes.

A. Just the exact number of feet from this gangplank to the open passageway I do not know.

Q. No; you are not being tied to the exact footage. Just give generally the course you took.

The Court: He can draw that line in the direction in which he walked.

The Clerk: He will have to have a backing on part of the map, your Honor.

The Court: If you want to, you can spread the map out on the table and make your lines and then we can look at it. I think ink will show better than a pencil.

Mr. McHose: Yes; that is better.

The Court: Would you rather have ink to show up better?

Mr. Gallagher: I tried it, your Honor. Get the red pencil and see if it makes a better mark.

Mr. McHose: Don't you think that is better? (Drawing [107] on map.)

Mr. Gallagher: Yes.

A. I don't remember just how this circle went in here.

Mr. Gallagher: This is an open space here.

A. That is the place I went and I did turn and came over to this passage. I guess that would be the door here some place.

Mr. Gallagher: There is no door there.

A. I come over there some way; I don't remember how. I know I made a circle.

(Testimony of David L. Richardson)

Mr. McHose: It is my understanding this is open here; that there is a hatch there but that this is open there.

Mr. Gallagher: Yes; you can walk on the hatch cover.

A. Does it show a hatch there?

Mr. Gallagher: Yes; right there.

A. Right there is where I come out at.

Mr. Gallagher: All right. Just draw up to where you ended.

Mr. McHose: You are indicating that black hatch door at the end of the passageway? A. Yes.

The Court: Mark that "X-2," the point of exit.

Mr. McHose From the port side.

The Court: From the port side. Since you have used a blue pencil, suppose you trace that also and that will make [108] the line more distinct. And you might show, with an arrow, the direction in which you were going as you follow around the course there.

Q. By Mr. McHose: You are indicating you went through the opening at the end of the port passageway and turned to the right, and this little object here, which is shown to be a space 4 feet by 6 feet, is the hatch down which you fell? A. Yes, sir.

The Court: You might mark this hatch with an "X" clear through there.

Mr. McHose: "X-3," your Honor?

The Court: "X-3."

Q. By Mr. Hon: David, you have now drawn a blue and a red line from "X-1," leading around the aft of the ship up to a point marked "X-2"?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. Now, does that represent the course you took after you got onto the ship? A. Yes, sir.

Q. Was there a door or anything taking the place of a door on the starboard side when you entered that passageway? A. A canvas flap.

Q. At that time, then, you shoved the flap back and went right into the passageway?

A. Yes, sir. [109]

Q. Was that passageway lighted? A. Yes, sir.

Q. What was your purpose in going into that passageway?

The Court: Which passageway is that?

Mr. Hon: The only passageway we have referred to, to the aft of the ship. The only one I will refer to will be this passageway starting at the entrance on the starboard side, making the horseshoe turn around to "X-2."

Q. By the way, it might be well for you to mark "X-4" on what represents the entrance into the passageway on the starboard side. Will you mark this "X-4" right at the entrance where you entered, to represent the entrance to the passageway when you first entered it?

A. Yes.

Mr. Gallagher: You might be able to make that a little clearer to his Honor if it is not clear already. This thing we have been referring to as the passageway on the starboard side and the passageway on the port side is nothing more than a hallway, as we talk about it on land.

The Court: I think you described it in your statement earlier; sort of a catwalk.

Mr. Gallagher: No, your Honor; it is not a catwalk at all. The catwalk is out here on the open deck. You

(Testimony of David L. Richardson)

see, this is a covered hallway like you would find in a building.

Mr. Hon: Add rooms on each side. [110]

The Court: I understand.

Mr. McHose: To make it a little more clear, your Honor, when he boarded the ship here, he was on the main deck. This is entirely open and the catwalk is on the deck above, running along the top of this deck. And he walked on the open deck along here until he came to the door going into the passageway, and then he was in an enclosed space, with a ceiling over his head, representing the deck above, but that decking extended out to the end of what they called the after house, which is right here near this point.

Mr. Hon: You have got written here, "Officers' Mess." This is where the officers' mess was on the ship, is that right?

Mr. McHose: I assume so; yes.

Mr. Hon: And this is the petty officers' mess across the passageway?

Mr. McHose: I assume so.

Mr. Hon: And these rooms are all as represented here, is that true?

Mr. McHose: I don't thing that is material.

Mr. Hon: But that is the condition the way the ship was built?

Mr. McHose: I think so.

Mr. Hon: And, as far as you know, it was that way on the night of the accident? [111]

Mr. McHose: Yes.

Q. By Mr. Hon: What was your purpose of walking from "X-1" over to "X-4" and going through this lighted

(Testimony of David L. Richardson)

passageway over to "X-2"? What was your purpose in going in there?

A. To make a general inspection.

Q. To make a general inspection? A. Yes, sir.

Q. When you come to "X-2," that is the exit from the port side of this passageway? A. Yes, sir.

Q. This is "X-2" right where I am pointing?

A. Yes, sir.

Q. When you got to "X-2," did you find a door leading out onto the main deck? A. A canvas flap.

Q. There is a canvas flap, is that right?

A. Yes, sir.

Q. How did you get out onto the main deck?

A. I pushed the canvas flap back.

Q. You pushed it back? A. Yes, sir.

Q. And then stepped out? A. Yes, sir.

Q. What was the condition of the main deck with regard to light or dark when you stepped out from the passageway? [112]

A. It was dark.

Q. It was dark? A. Yes, sir.

Q. Was there a coaming or a raised threshold that you had to step over in getting out of the passageway from the port side? A. Yes, sir.

Q. About how high was that coaming?

The Court: What is it, now, that you are referring to?

Mr. Hon: I asked him, your Honor, when he stepped out onto the main deck, if he had to step over a coaming or the threshold through that doorway.

Mr. Gallagher: We don't have to guess about that. We have shown proctors for the libellant photographs and the photographs show how high it was.

(Testimony of David L. Richardson)

(Inaudible conversation between counsel.)

Mr. Hon: Your Honor, I think, to be a little informal, we can show you that from the photographs.

The Court: If I understand, a coaming is the sort of solid threshold that he stepped over.

Mr. Gallagher: No; it isn't exactly that.

The Court: If you want to introduce these photographs, you may introduce them later.

Mr. McHose: We might as well introduce them now. This could be marked as a libelant's exhibit. [113]

Mr. Hon: Not libelant's; no. Respondents' Exhibit A will be all right. Shall we identify our exhibits separately?

Mr. Gallagher: I don't thing it is necessary. So far as the photographs are concerned, let's introduce them as joint exhibits.

Mr. McHose: We will offer them in evidence.

The Court: Is there any objection?

Mr. Hon: No objection.

Mr. McHose: They are photographs which were taken some time after the accident happened but show the general condition.

Mr. Hon: It is not supposed to truly represent the condition at the time of the accident, is it?

Mr. Gallagher: It is supposed to truly represent all of the substantial objects shown in the photograph. Otherwise, there have been no changes structurally, pipes and things like that.

Mr. Hon: Structurally but any loose objects and the like were not necessarily there at the time and you wouldn't know?

Mr. Gallagher: No; I wouldn't know.

(Testimony of David L. Richardson)

The Court: It may be received as Respondents' Exhibit A and the second one may be received as Exhibit B.

Mr. Gallagher: It is a photograph which shows the hatch and other substantial particulars of the ship's structure [114] looking from the port to the starboard side of the vessel.

Mr. McHose: I was going to take each of them and explain them to your Honor.

The Court: Very well.

Mr. McHose: The first one, which we have marked as Exhibit A, is a view taken from this position over here, looking from this bulkhead. When we speak of the bulkhead, that means this: it is a wall of the ship going across the ship. In other words, this is a solid structure here all the way across the ship and there is a door here and a door here. Photograph A shows that door closed. Obviously, that is an outer surface of the ship and must be solid against the waves, so that bulkhead can be closed and made very fast, like a solid part of the ship. But on the evening of the accident, according to the testimony of Mr. Richardson, that door was open and that canvas curtain was hanging across there, probably to keep the light out. That Figure A, your Honor, shows this portion of the ship looking at it like that. It shows the hatch, the bunker hatch, which is this little space here, four feet wide by six feet long, according to the blueprints, and it has these bolts to fasten it down tightly. And in this picture the cover is closed. The picture also shows a valve here. This wheel is to a valve leading to one of the oil lines that runs across the ship up here above our other lines, and this [115] structure which you can see here, with the iron chain across, is the beginning of the catwalk.

(Testimony of David L. Richardson)

In other words, the catwalk starts at the deck above here and goes out all along the reach of the ship up to the forward house, so that you can walk along, if you go up to this part of the deck, along that catwalk, all the way forward, without crossing the main deck of the ship.

The photograph Exhibit B is a photograph which was taken looking this way, looking from the port to the starboard side of the ship, and it shows the same bunker hatch but with the hatch cover opened. And the court can see that the hatch cover opens on hinges and leans back, when it is opened, against the forward end of the bulkhead wall.

This picture here was taken some time later when there was a lot of other material on the deck of the ship, and these lines across here are air hoses or electrical conduits of some kind. We know nothing about what may have been on the deck on the night that the accident happened.

Exhibit C is another view which is looking from the door, and in that picture the door is opened and is leaning back here against the bulkhead wall. And this picture shows quite clearly the height of the coaming. The coaming referred to is the space between the main deck and the lower sill of the door, which is quite high. And this one also shows the hatch cover opened and one of the ship's pipes in front of the hatch [116] opening. These air hoses, or electrical conduits, whatever they may be, were also there at the time this picture was taken but we don't know whether anything of that sort was there the night of the accident. We don't claim that as the condition then.

Mr. Hon. That is a very important point. And, in observing Exhibit C, I have no objection to its introduction but these are air hoses that have no place in the pic-

(Testimony of David L. Richardson)

ture because this picture was taken, according to this, on 3-8-46, and the only purpose of putting this picture in is to show the open hatch and the lid to it leaning back against the bulkhead. This is the door itself leaning back against the bulkhead. But those rods have nothing to do with this accident. We say we were not there at that particular time they were opened.

Mr. McHose: We don't know what was there. The ship was undergoing repair and there may have been a great many other air hoses here.

The Court: To what do you refer as the coaming?

Mr. Hon: This part right here. Here is a coaming here.

The Court: That is the material right in the door?

Mr. Hon: Yes, your Honor. You have to step over it.

Mr. McHose: If you look at Exhibit A, the bulkhead door in the ship is kept up above the level of the deck so, when the ship is rolling, water won't be coming into it. They are [117] cut out of the solid steel, maybe a foot above the deck. A coaming, in reality, is this space on a hatch.

The Court: It is a belt around the hatch?

Mr. McHose: Yes. Whether that is properly called a coaming, I am not sure, but it is the door sill over which you have to step to go in or out.

The Court: Call it a threshold, if you like.

Mr. Hon: Yes.

The Court: All three exhibits may be admitted in evidence.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Now, David, what was your purpose in stepping from the lighted passageway onto the main deck?

A. For general inspection of the main deck.

Q. How many steps did you take, before the accident, after you stepped from that doorway?

A. A step and a half or maybe two steps.

Q. One foot went over the coaming of the —

Mr. McHose: I suggest that you don't lead him.

Q. By Mr. Hon: Just tell us what your actions were from the time you started to take your first step to get out onto the main deck, until the accident happened.

A. I walked up and pushed that canvas flap back and I looked out and set my left foot outside of the door and, as I brought my right one out, I turned, as it was necessary for it to go down on the deck, and I fell in the hold. [118]

Q. Then, I take it, after you got your left foot over the coaming, you took one step and went right down the hatch? A. Yes, sir.

Q. Were there any lights at or near that open hatchway? A. No, sir.

Q. Were you able to see that open hatchway by looking down? A. No, sir.

Q. Was there any guard or railing around that?

A. No, sir.

Mr. McHose: Just a moment. I object to that last question and move that the answer be stricken on the ground he has already testified he couldn't see anything, and, unless he saw that there was not any guard there, I think the answer should go out,

(Testimony of David L. Richardson)

Mr. Gallagher: I join in the motion.

The Court: That may be stricken. When you put your left foot out, it would rest on the deck or solid ground or something?

A. Yes, sir; when I put my left one out.

The Court: That is, you stepped over this coaming or threshold, or whatever we call it, and your left foot then rested on solid ground, did it? A. Yes, sir.

Q. And then you stepped with your right, is that right? [119] A. Yes, sir.

Q. You stepped over the same place there?

A. Yes, sir.

Q. And then is when you fell, is that correct?

A. Yes, sir.

Mr. McHose: When you say "solid ground," you mean the deck, don't you?

The Court: I should have said the deck.

Mr. Hon: Your Honor means the foundation under his foot.

Mr. McHose: It is a steel deck.

The Court: I understand that.

Mr. Gallagher: And your Honor asked him whether he put his right foot down as he came over or whether he stepped sidewise like that? I didn't quite understand.

The Court: You may tell just how you stepped over.

Mr. Hon: Yes; the directions.

A. When I set my left foot down, I turned to the right.

The Court: You turned to the right?

A. Yes, sir.

The Court: With your left foot on the deck?

A. Yes, sir; and, as I turned to put my right one down, I fell in the hold.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Did your foot come in contact with any object prior to your falling into the hold, your right foot? [120] A. No, sir.

Q. And how far did you fall, David?

A. Approximately 37 foot.

Q. What position were you in when you came to a rest? A. A sitting position.

Q. A sitting position? A. Yes, sir.

The Court: I think you have covered that already.

Mr. Hon: I believe I did; yes.

Q. And what was your purpose in turning to the right as you came out of the door?

A. To inspect for fire extinguishers and fire hose.

Q. And where did you expect to find those, Mr. Richardson?

Mr. Gallagher: That is objected to upon the ground it is immaterial unless there were some there.

Q. By Mr. Hon: Then, your purpose in making the right turn was to inspect the ship for fire extinguishers at that time, is that right? A. Yes, sir.

Q. Up to that point had you seen or found anybody on the ship? A. No, sir.

Q. Or any officer? A. No, sir. [121]

Q. Mr. Richardson, among other things, was it your purpose before leaving the ship to contact the officer-in-charge? A. Yes, sir.

Q. And that was a part of your duty at the time?

A. Some time when I was on there, I was to take a report from the officer on duty.

Q. Take a report from the officer on duty?

A. Yes, sir.

Q. And up to the time of the accident that officer had not been seen by you? A. No, sir.

(Testimony of David L. Richardson)

Q. Was there any regular prescribed route that you had to take in making your inspection?

A. No, sir.

Q. And what part of the ship were you inspecting or to inspect? A. All the ship.

Q. The entire ship? A. Yes, sir.

Mr. Gallagher: Your Honor, during the lull, I want the record to show this. I made a positive statement this morning and I am not sure whether it is correct or not. I don't know for sure about the guard who was at the bottom of the gangway or the gangplank, and I will find out before the case is over. [122]

The Court: Do you mean the guard that ushered the libelant on board?

Mr. Gallagher: There were two guards, as I understood it. One was out at the Bethlehem Company gate. Then there was another man he described as a guard down at the foot of the gangway, on the dock, and it is that man that I am not certain about, the one down at the gangway, on the dock, just before he went aboard the ship.

The Court: Is there anything further?

Mr. Hon: There is one thing I was looking for, your Honor. I could probably get permission to ask it later. So at this time I will submit the witness for cross examination. May I ask what time you adjourn, your Honor?

The Court: I think about 4:30.

(Testimony of David L. Richardson)

Cross Examination

Q. By Mr. McHose: Mr. Richardson, I understand that you came out here six months or so before this accident happened. Is that about right?

A. It wasn't six months. It was from four to five months.

Q. Do you remember when you first went on duty down at Terminal Island?

A. On the 10th of February; somewhere in that neighborhood.

Q. February 10, 1944? [123] A. Yes, sir.

Q. And the accident happened August 6, 1944?

A. Yes, sir.

Q. Now, during that period of time my understanding is that your duties called for you to go aboard and inspect ships? A. Yes, sir.

Q. And you were down along the waterfront there from the time you began your duties here until this accident happened? A. Yes, sir.

Q. During that time you boarded a considerable number of ships, did you not? A. Quite a few; yes, sir.

Q. And did you make inspections similar to the inspection you intended to make on this ship the night of the accident? A. Yes, sir.

Q. And did you also perform other duties besides the duty of inspection on board the ships? A. Yes, sir.

Q. And did you board different types of ships?

A. Yes, sir.

Q. By that I mean freighters and Navy vessels and tankers. [124]

A. I didn't board Navy vessels. I boarded —

(Testimony of David L. Richardson)

Q. Commercial vessels?

A. Commercial vessels.

Q. And had you boarded vessels at the Bethlehem shipyard on previous occasions? A. Yes, sir.

Q. You had, then, gone on board vessels which were undergoing repairs? A. Yes, sir.

Q. You knew, did you not, that this vessel, the Frank Drum, was in the Bethlehem yard undergoing repairs the night you boarded her? A. Yes, sir.

Q. You had, as I understand you, been on board other tankers on previous occasions?

A. That is right.

Q. And you are generally familiar, are you not, with the deck arrangement of a tanker?

A. Fairly well.

Q. You know what we mean when we refer to the catwalk, do you? A. Yes, sir.

Q. Will you explain to the court what the catwalk is?

A. It is an upper walkway. It is a walkway about six feet above the main deck, or more or less that number of feet. [125]

Q. What is the purpose of the catwalk? Do you know? A. To walk over.

Q. To enable people to get from the after part of the ship up to the forward end of the ship, without going along the main deck, is that correct?

A. That is correct.

Q. And that catwalk has chains or ropes along the side of it, so you can walk along safely in it, is that correct? A. That is correct.

Q. On the deck of a tanker, Mr. Richardson, there are a great many pipelines, is that true?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. And those pipes are large pipes that are used in pumping oil and other commodities from one tank to the other of a tanker, is that true? A. Yes, sir.

Q. So that they may be as large as eight or 10 inches in diameter, is that correct?

A. They are all different sizes, some small and some larger.

Q. They are various sizes and they get to be fairly good sized, do they not? A. Yes, sir.

Q. Did you happen to look at the pictures which were [126] introduced in evidence here a little while ago? I show you Respondent's Exhibit A and ask you if you recognize that as the deck of a tanker, without confining you to identifying it as the Frank G. Drum. You can look at that picture and tell us if it is the deck of a tanker, can you not? A. Yes.

Q. And that is like the deck of a good many tankers that you boarded when you were making an inspection?

A. Something similar to it.

Q. And the pipes that are shown here are similar to the pipes that are commonly on the decks of tankers, is that true? A. That is true.

Q. I show you an object here in the center of this picture, with a wheel on it. Do you know what that is?

A. That is a valve.

Q. That is a valve that is used to regulate the flow in the particular pipe to which it is attached, is that right? A. I guess so.

Q. And you would turn the valve to shut off the pipe or you open it to let whatever it is run through the pipe, is that correct? A. That is correct.

(Testimony of David L. Richardson)

Q. And you recognize this object that is beside [127] the valve, do you? What is that?

A. That is the hatch.

Q. That is a hatch, a means of getting down into the compartment that is below the deck, is it not?

A. Yes, sir.

Q. And you have seen these hatches on many vessels that you have boarded, isn't that true?

A. That is true but maybe not in that particular place.

Q. In various places on the decks of ships?

A. Yes, sir.

Q. And, when I show you the blueprint of the ship here and point out to you various places where there are hatches, will you agree with me that all of these little objects that are marked as hatches are hatches on the deck of that ship?

Mr. Hon: Just a minute, your Honor. I submit that the question is not fair. There must be some showing that this witness has knowledge of the ship.

Mr. McHose: I will reframe the question.

Q. You do know, do you not, Mr. Richardson, that there is a hatch leading to every compartment in the ship, in a tanker, is that right?

A. No; I didn't know that.

Q. Well, you do know, do you not, that in a tanker there are a great many different compartments? [128]

A. Yes; I know that.

Q. In which commodities are carried?

A. Yes, sir.

Q. And you do not know that there is a hatch to every compartment but you do know there is a hatch to a good many compartments? A. A good many.

(Testimony of David L. Richardson)

Q. Have you during the time you have been aboard ships seen those hatches closed like this in this photograph? A. Yes, sir.

Q. And you have also seen them opened, have you not? A. Not without being lined off, roped off.

Q. That isn't responsive. My question was you have seen them opened? A. Yes, sir.

Q. I don't think I asked you whether you had been on the Frank Drum before the night this accident happened. Did I? A. No, sir; you didn't ask me that.

Q. Had you been on that vessel before?

A. Not that I recall.

Q. You might have been on it at some time when you inspected a vessel but you are not sure, is that it?

A. Yes, sir; that is it.

Q. You didn't always keep a record of the many vessels [129] that you boarded and you might have been on this one some other time?

A. I could have been on it some other time but I don't believe so.

Q. When you went on board these ships, Mr. Richardson, I would like to know a little more about what you did, what your duties were, when you say you went on board to make an inspection, to find out where all the fire extinguishers were, to see that they were in place, and to find the fire hose. Let's take one point at a time. You say, first, that you wanted to find out where all of the fire extinguishers were. How would you find that out?

A. I didn't know exactly where all of them were supposed to be but I was supposed to look for them and to see whether they were all proper or not.

(Testimony of David L. Richardson)

Q. Were there supposed to be a certain number of fire extinguishers on board a ship? A. No, sir.

Q. You didn't count the number of fire extinguishers on board? A. No.

Q. What do you mean when you say fire extinguisher? What kind of a fire extinguisher?

A. There are several different kinds; ones you can use just by hand, carying them around, and then there is some [130] that stand erect, big ones.

Q. Speaking, first, of those you use by hand, do you mean they are just lying around the ship and you pick them up off of the deck?

A. No, sir; they are hung up on the bulkhead.

Q. And they are various sizes? Is that what you have said? A. Yes, sir.

Q. Now, when you say you go on board to find out where they are, if you find out where they are, what do you do about it then?

A. That is all I do; just find out if they are there.

Q. How do you determine whether there are enough there or not?

A. Well, if there is a large place on the ship and there wasn't, say all through one of those passageways there wasn't any fire extinguishers or along that bulkhead on the outside or along that catwalk, I would know there was something wrong.

Q. And what would you do if you found that to be the case?

A. I would get hold of the man and tell him about it and see if he couldn't get some put there.

(Testimony of David L. Richardson)

Q. Was it left discretionary to you to determine whether there were enough fire extinguishers on board? [131]

A. No; not all of it to me; no.

Q. If you thought there ought to be more than you found, then what would you do about it?

A. I would ask the man to put more out.

Q. And, if the man said he hadn't any more or wouldn't put any more out, what would you do?

A. I would report it to the O. D.

Q. But the man you would report it to and discuss this situation with would be the mate of the ship?

A. Yes, sir.

Q. Do you recall finding any fire extinguishers when you walked through the passageway?

A. No; I don't recall.

Q. Where did you expect to find fire extinguishers out on the deck of the ship?

A. Along that bulkhead and up by the side of the catwalk.

Q. Referring, again, to Respondents' Exhibit A, I will ask you to assume for the moment that that is the bulkhead, the forward end of the bulkhead, on the after house here, on the Frank G. Drum. Do you see any fire extinguishers on that photograph or any place where fire extinguishers might have been kept?

A. I don't see none.

(Testimony of David L. Richardson)

Q. Have you ever, Mr. Richardson, on a tanker found [132] fire extinguishers along the bulkhead in a place such as this? A. Yes.

Q. You have? A. Yes; I have.

Q. Can you name any vessels on which you found fire extinguishers in that position?

A. No; I don't recall any ships' names.

Q. You spoke about fire extinguishers on the catwalk. Where would they be maintained on the catwalk?

A. Fastened to that end rail.

Q. Along the rail?

A. Yes; just as you come out of the bulkhead, on the inside of the house up there. When you come out on that catwalk, there should be a fire extinguisher sitting there.

Q. In order to get up to the catwalk, it would be necessary for you to go up to the deck above the one you were on, isn't that true? A. That is true.

Q. And, looking at the blueprint here, I show you some stairs. As you went along that passageway, did you see the stairs leading up to the other deck?

A. I don't remember.

Q. Well, you know, if those stairs are properly shown on this blueprint, that the way you would get up to the other [133] deck or the upper deck would be to go up the stairs? A. Yes, sir.

Q. And the only way to get on the catwalk would be to enter it from the deck above? I don't want to confuse you. I am simply trying to bring out the fact

(Testimony of David L. Richardson)

that, to get onto the catwalk, you had to go up the stairs or in some way get on the deck above where you were, isn't that true?

A. I don't know about that particular ship. I just went that short route but it seems like on other ships I have been on there were other ways to get on the catwalk; maybe steps.

Q. Yes; there might be some steps along the catwalk or some way of getting up to it from the main deck. But the ordinary way to enter the catwalk is the deck above the deck where you were?

A. Yes; that is right.

Q. And those fire extinguishers that were along the catwalk would be on the deck above where you were?

A. That is right.

Mr. Gallagher: Does your Honor adjourn at 4:30?

The Court: I think we will take a recess until tomorrow morning. Do you want to begin at 9:30 or 10:00?

Mr. Gallagher: I would prefer 10:00.

The Court: Very well; 10:00 o'clock.

Mr. Gallagher: Your Honor, may we have the witnesses in- [134] structed to return?

The Court: Yes. All witnesses are instructed to return and be here tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, February 12, 1947.) [135]

Los Angeles, California, February 12, 1947, 10.00 o'clock a. m.

(Same appearances.)

The Court: You may proceed.

DAVID LAWTON RICHARDSON.

the libelant, being previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Resumed)

Mr. Hon: May I inquire, first, what scale is the map drawn to, Mr. McHose?

Mr. McHose: I don't know. Well, it shows the scale as $\frac{1}{8}$ of an inch equals one foot, according to the map.

Mr. Hon: Do you know what the tonnage of the boat was?

Mr. Gallagher: I don't know.

Mr. McHose: I would like to stipulate, if you will, that it was over 3,000 tons.

Mr. Hon: I don't know. I have no knowledge of it. If you say it was, all right.

Mr. McHose: I would imagine it was about 16,000 tons.

Mr. Hon: All right.

Q. By Mr. McHose: You were talking about fire extinguishers yesterday, Mr. Richardson. When you walked through the passageway of the vessel, did you inspect fire extinguishers there?

A. I don't remember whether I saw any fire extinguishers [136] there or not.

Q. Isn't it customary to have fire extinguishers in the passageway of a vessel such as this?

A. Yes.

(Testimony of David L. Richardson)

Q. And, if there were extinguishers there, I suppose you inspected them, did you?

A. I saw them if they were there.

Q. You don't remember now? A. No, sir.

Q. Did you see any hose in the passageway?

A. I don't remember.

Q. Were you intending to inspect other vessels in the Bethlehem yard on the night of the accident?

A. Yes, sir.

Q. How many others?

A. All that were in there. I don't remember how many there were in the Bethlehem yard.

Q. Had your instructions told you to board other vessels as well as this particular vessel?

A. Yes, sir.

Q. And this happened to be the first one you went aboard after you went into the yard?

A. Yes, sir.

Q. Where did you intend to go after you went out the opening onto the deck? Did you have your mind made up as to [137] where you were going to proceed?

A. No; no definite place; just maybe to the bow of the ship and back over to the gangplank.

Q. Did you intend to contact the officer-in-charge of the ship? A. Before I left the ship; yes, sir.

Q. Up to that point, had you made any effort to find him?

A. When I was walking through the passageway, I was looking for fire extinguishers and, if I had run across the mate, I would have got a report from him then.

(Testimony of David L. Richardson)

The Court: What was that answer?

A. When I was going through the passageway, if I had run across the mate, I would have gotten a report from him at that time, any time when I was on the ship, I could have taken his report.

Q. By Mr. McHose: Explain to the court what that report is.

A. Just asking him if the ship was in good shape, how many of the crew there were aboard, and what his rating or rank was.

Q. Did you get those reports in writing or make them in writing?

A. We carried a little slip of paper around with us and we wrote all that down. [138]

Q. And would you have the mate sign it?

A. No, sir.

Q. Did you put it in any particular written form when you reported it to your officer?

A. It was wrote down each night, the number or the type of fire extinguishers and such as that, and it was handed by me to the O. D. at the barracks.

Q. You signed it and turned it in?

A. Yes, sir.

Q. When would you do that?

A. When I went off duty at 12:00 p. m. that night.

Q. When you made these inspections, did you go below decks on the ship?

A. Yes, sir; we went down to the engine room.

Q. Did you intend to do that on this ship?

A. Yes, sir.

Q. When were you going to do that?

A. Any time when I was on it, before I left.

(Testimony of David L. Richardson)

Q. You had no prescribed or set method of going through the ship, then? You could go any place any time you wanted to? A. That is right.

Q. It was left up to your judgment as to how you would make the inspection, is that it?

A. Yes, sir. [139]

Q. You didn't talk to anyone on board the ship before the accident happened, is that correct?

A. No, sir.

Q. You didn't ask anybody to turn on any lights for you before you went on the deck?

A. I didn't see anybody to tell.

Q. You did testify, though, on direct examination, that, when you came up to that canvas and pushed it aside, it was dark at any place where you went?

A. When I pushed the canvas back, the light showed just outside the door, that is, the space where I set my left foot down, and the rest of it was dark.

Q. But the deck itself was dark when you went on it? A. Yes, sir.

Q. The only place you could see was the place where you put your first step? A. Yes, sir.

Q. After you left the hospital, Mr. Richardson, I understand you went back to your home in Florida?

A. Yes, sir.

Q. And, after you had your leave, you came back in 1945 and then you went back to your farm and you have been there ever since, is that correct?

A. That is correct.

Q. How large is your farm? [140]

A. 35 acres.

(Testimony of David L. Richardson)

Q. Does that farm adjoin your father's farm?

A. Yes, sir.

Q. And your father's farm is how large?

A. Some of it has been sold. I don't know just how large it is now. It is 160 acres.

Q. When we took your deposition in October, this last October, 1946, do you remember testifying that your father's farm was 350 acres?

A. You must have gotten it wrong. It was 260 instead of 360.

Q. Even if some of it has been sold, how large was it before part of it was sold? A. 260.

Q. And what do you have on your farm and your father's farm?

A. We raise cows and hogs and corn and cane.

Q. Do you grow some oats? A. Yes, sir.

Q. And do you grow some potatoes?

A. Yes, sir.

Q. And you do plowing work on the farm, do you not? A. Well, Dad does.

Q. You have assisted in some of that work in the last year, have you not? [141] A. Very little.

Q. But you have done some of it?

A. Some of it; yes.

Q. And you have fed some of the stock, have you not?

A. Yes.

Q. And you drive a truck and drive a tractor, do you not? A. I drive a tractor very little.

Q. You have done that work? A. Yes, sir.

Q. You have also driven a truck, haven't you?

A. Yes, sir; some.

(Testimony of David L. Richardson)

Q. Now, you are receiving pay from the United States Government, aren't you, Mr. Richardson?

A. Yes, sir.

Q. Will you tell the court how much you are getting?

A. \$41 and some few cents a month.

Q. You receive a check from the government for approximately \$41 each month?

A. Yes, sir.

Q. And you expect to continue to receive that money indefinitely?

Mr. Hon: Just a minute, your Honor. I think that is immaterial, what he expects.

Mr. McHose: He testified as to this on his deposition. [142]

The Court: He may answer.

A. That is not left up to me whether I draw it the rest of my life or not. It is left up to the Veterans' Administration.

Q. You have received the money up to now?

A. Yes, sir.

Q. And you have not received any notification that you will not receive it in the future, have you?

A. No, sir; I haven't.

Q. Did you know the men who came to help you out of the bunker hatch?

A. No, sir.

Q. You hadn't seen any of them before that time?

A. Not that I recall; no.

Q. And you don't know what their names are?

A. No, sir.

Mr. McHose: That is all the questions I have.

Q. By Mr. Gallagher: Mr. Richardson, when you entered the yard of the Bethlehem Company, did you have to go through a gate?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. Had you ever been in that yard before that night?

A. Yes, sir.

Q. On how many occasions?

A. Eight or 10; maybe more. I don't remember. [143]

Q. Had you inspected or boarded any tankers on those prior visits?

A. I don't remember whether I had boarded any tankers but I presume that I had.

Q. As you would approach the particular ship you intended to board, is it visible to you, as you recollect, on the dock? A. Yes, sir.

Q. How far away from the gate through which you walked to enter the yard of the Bethlehem Company was this particular ship?

A. Pardon me but ask that again.

Q. Do you remember walking through the outside gate to get into the yard? A. Yes, sir.

Q. Then, did you remain on the premises of the Bethlehem yard up until the time you walked aboard this ship?

A. Yes, sir.

Q. How far did you have to walk from the gate to the place where you got on the ship?

A. I would guess from 75 to 100 yards.

Q. As you approached the ship, did you come alongside the stern of the ship or the bow of the ship first?

A. The bow of the ship; yes, sir.

Q. It was up against the dock, that is, the star-board [144] side of the tanker was up against the dock?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. As you walked along that 75 yards before you got to the ship, you could see the lighting conditions on the forward end of that vessel, couldn't you?

A. You couldn't see the ship until you got up pretty close to it. You kind of walked in a circle going down there and, when you get up close to the ship, you cannot see the top of the ship.

Q. When you went up the gangway, what lighting conditions did you observe before you went into the passageway?

A. A light at the gangplank and lights on the dock.

Q. Let's just stick to the ship now. Was there more than one light on any part of the forward portion of that ship when you boarded it?

A. The light at the gangplank was the only one I saw.

Q. Other than the light at the head of the gangplank, you knew that the entire forward portion of the ship was in darkness, didn't you?

A. Not the entire forward end of the ship.

Q. Well, what portion of it was illuminated?

A. The port side—you couldn't see on it, but the starboard side, by the lights from the dock, you could see.

Q. So that at the time you boarded the ship, the lights from the dock already illuminated the starboard side of the [145] deck? A. Yes, sir.

Q. And you could see plainly on that side of the deck if you wanted to walk on it, couldn't you?

A. Yes, sir.

Q. Was that starboard side of the deck fairly well illuminated through the entire length of the deck?

A. I don't remember about that.

(Testimony of David L. Richardson)

Q. Well, when you went aboard, did you look over toward the port side of the ship, before you went into the passageway?

A. I glanced around all over the ship.

Q. Could you see anything at all on the port side?

A. Not that I recall, I didn't see anything.

Q. What I am trying to find out is this. Did you look and were you unable to see anything on account of the darkness or did you just take a casual glance?

A. I just taken a casual glance.

Q. Then, you didn't make any effort to find out what the conditions were over there on the port side of the deck, did you? A. Not then; no, sir.

Q. When you went down the starboard passageway, did you stop anyplace before you made your turn?

A. No, sir; I didn't stop. [146]

Q. Were you walking continuously from the time you entered the forward end of the starboard passageway, up until the time you stepped into the hatch?

A. To my best recollection, I was.

Q. Then, you did not open any of the doors to any of the quarters in the starboard passageway, did you?

A. No, sir.

Q. And you didn't open any of the doors to any of the quarters or rooms along the port passageway, did you?

A. No, sir; I didn't.

Q. Now, in your experience in the Coast Guard, didn't you learn where the officers' quarters were located on tankers?

A. To the best of my knowledge, they were located at different places on different ships. Officers' quarters are generally above, ordinarily.

(Testimony of David L. Richardson)

Q. You would very seldom find the officers' quarters in the after end of the ship, isn't that right?

A. You find them up on the upper deck, the one above the main deck, most of the time.

Q. If you were looking for an officer, why didn't you go up to the upper deck instead of going through that passageway?

A. I would have went up there some time when I was on the ship, before I got through with it, through with my in- [147] spection.

Q. Will you please tell the court how you could inspect a dark place without a flashlight or some means of illumination?

A. Well, sir, up over your head, where them fire extinguishers and fire hose would ordinarily hang, you could see up high where they were, but down below there was a shadow, and that is the way I expect I found it.

Q. Did you have any light with you?

A. No, sir.

Q. Did you usually carry a flashlight?

A. No, sir.

Q. Was it your practice to roam in ships in pitch black darkness?

A. There wasn't many ships that was pitch black dark.

Q. Did you roam around ships that were in pitch black darkness?

Mr. Hon: I object to that as not within the issues of the case. It is purely argumentative as to what he may have done on other ships.

The Court: He may answer. Will you read the question, please?

(Testimony of David L. Richardson)

(Question read by reporter.)

A. If that duty called me, yes, sir.

Q. By Mr. Gallagher: You were told by your superior to [148] walk around in places that were not illuminated at all?

A. We were told to inspect ships, go all over them, whether there were lights there or not.

Q. Did you think that there was a passageway from the port side to the starboard side at that place?

A. Well, I've been across decks of ships, all over the main deck; not necessarily a passageway.

Q. From your experience in walking along tankers, you knew that you were about to run into hatches and pipes and valves and all sorts of machinery, didn't you?

A. Yes. But you could take your time going over.

Q. When you stepped out of the port passageway, you left this canvas flap closed behind you, didn't you?

A. Yes, sir.

Q. And at that time you couldn't even see a foot ahead of you, could you?

A. You could see lights on the dock.

Q. I am talking about the surface that you intended to walk on. A. No, sir; you couldn't see.

Q. Well, did you stop there for a minute to let your eyes become accustomed to the darkness?

A. When I set my left foot down—

Q. No. Tell me whether you stopped there or continued walking. [149]

A. That is when I fell. When I got at that hold, that is when I fell and I don't remember nothing else about it.

(Testimony of David L. Richardson)

Q. When you stepped out of the port passageway and you got out on the deck, did you stop still there at all?

A. I don't remember whether I stopped or not.

Q. When you stepped out of that passageway, which way were you facing?

The Court: Let me ask you at this time, is it necessary to go over the same ground that your co-counsel went over in your cross examination? I realize that you have a part in this lawsuit but I don't think you should cover the same ground that he covered.

Mr. Gallagher: I didn't think Mr. McHose covered the particular point that I am trying to cover. Your Honor asked him a question on that same subject.

The Court: I thought he went into his actions quite thoroughly when he was cross examined, as to what happened.

Mr. McHose: I think Mr. Gallagher is correct, your Honor. That particular question, I don't believe, has been answered and I would like to have it.

The Court: You may proceed but I want you to keep in mind, however, you should avoid re-asking any questions that have been gone into by your co-counsel, if possible.

Mr. McHose: We are not co-counsel, your Honor.

The Court: You are in some respects. You have common [150] interests. You may answer the question.

Mr. Gallagher: Will you read it, please?

(Question read by reporter.)

A. When I first stepped out, I was facing forward of the ship, when I set my left foot down.

(Testimony of David L. Richardson)

Q. And then how did you turn?

A. I turned to the right.

Q. Did you lift your left foot off of the deck while you were turning to the right?

A. I brought my right one right out of the passageway.

Q. What did you do with your left foot? Did you leave it right there?

A. It was right where I set it down.

Q. So the only foot that you moved at all after you placed your left foot out on the deck, up to the time you went into the hatch, was the right foot?

A. The right foot; yes, sir.

The Court: That is to say, you were facing forward as you took a step, the first step, with your left foot?

A. Yes, sir.

The Court: And at that particular moment you were looking forward? A. Yes, sir.

The Court: And then, when you set out your right foot, you were facing which way? [151]

A. Right.

The Court: And you fell, is that it?

A. My right foot never did strike no deck.

The Court: In other words, you were headed in a direction towards the right when you fell?

A. Yes, sir.

Q. By Mr. Gallagher: Is this what you mean. that you stepped out and put your left foot on the deck and then you reached over with the right foot like that and stuck it in the bunker hatch?

The Court: Do you want to illustrate?

Mr. Gallagher: Yes.

(Testimony of David L. Richardson)

Q. Show us how you did it.

A. When I walked up there and pushed that back, I stepped out like that and paused, or I guess I paused or I think I did, and, as I come out, I turned like that and that is when I fell and that is the last I remember.

The Court: Indicating that you stepped out with your left foot and, when you paused, or after you paused, you turned and you stepped out with your right foot?

A. Yes, sir.

Q. By Mr. Gallagher: Did you see anybody from the Coast Guard there in the vicinity of the ship after the accident happened, excepting the ambulance?

A. Yes, sir. [152]

Q. Who did you see there?

A. Lieutenant Bodine. He was the O. D. at the time and, when they called him, he came out to the ship, and there were other guys or men there.

Q. Other Coast Guard people? A. Yes, sir.

Q. Did you see anybody come from the shipyard?

A. When I was laying there on the deck, they just all got around. I didn't see where they come from.

Q. Did you see anybody board the ship after the accident?

A. No, sir; I didn't see anybody because I was laying down on the deck.

Mr. Gallagher: I think that is all.

Redirect Examination

Q. By Mr. Hon: Mr. Richardson, you were asked if you had seen bunker hatches open. Did you ever see any bunker hatches or any hatches open on a ship, left open, that were not cargo?

Mr. McHose: What do you mean by "not cargo"?

(Testimony of David L. Richardson)

Mr. Hon: Well, some means to prevent people from falling in.

A. I didn't ever see any that wasn't cargo. I seen some that didn't have lines up on them, but there would be a man there at the hold and maybe men in the hatch working. [153]

Q. You stated that you get money from the government, I think \$41. What is that based on?

A. 30 per cent disability.

Q. The government gave you a 30 per cent disability rating, is that right? A. Yes, sir.

Q. You also mentioned something about a 35-acre farm. Is that farm improved or is it wood land?

A. It is not but 7 or 8 acres of it is in cultivation. The rest of it is in woods.

Q. Do you actually own that farm?

A. Well, I am paying for it gradually. I haven't got it paid for.

Q. How much have you paid down on it?

A. \$400.

Q. And you owe how much on it? A. \$800.

Q. In other words, you have got \$400 paid down on this piece of ground where you and your wife live?

A. Yes, sir.

Q. And you still owe 800 on it? A. Yes, sir.

Q. Were you ordered by your officer-of-the-day at any time to carry a flashlight? A. No, sir. [154]

Q. Were you ever furnished a flashlight?

A. No, sir.

Mr. Hon: That is all.

Mr. McHose: I would like to ask about two more questions, if I may.

No. 11757
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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corporation,

Appellant,

vs.

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HEM STEEL CORPORATION, a corporation,

Appellees.

APOSTLES ON APPEAL

(In Two Volumes)

VOLUME II

(Pages 241 to 506, Inclusive)

Upon Appeal from the District Court of the United States
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FILED

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Central Division

(Testimony of David L. Richardson)

Recross Examination

Q. By Mr. McHose: You have been on quite a number of cargo vessels, have you not, in addition to tankers?

A. Yes, sir.

Q. And you have been on those vessels when they have been working cargo? A. Yes, sir.

Q. And you have seen them with hatches open while cargo was being worked? A. Yes, sir.

Q. And, also, while they were getting ready to work cargo or in between periods of working cargo?

A. Yes, sir; I have seen that.

Q. Now, you received medical care from the Coast Guard and the Naval Hospital during the time you were having your leg repaired, is that true?

A. The Navy done that. The Coast Guard is in the Navy.

Q. You were taken care of in a Naval Hospital?

A. Yes, sir. [155]

Q. And you didn't pay anything for the treatment that you received? A. No, sir.

Q. And you reported to various doctors?

A. Yes, sir.

Q. And you told them what was wrong with you and what your complaints were and what your trouble was?

A. Yes; and they would examine me.

Q. And they made a number of examinations?

A. Yes, sir.

Q. Quite frequently? A. Yes, sir.

Mr. McHose: That is all.

Mr. Gallagher: Nothing further.

Mr. Hon: Nothing further. We will call Mr. Hart.

CHARLES B. HART,

a witness for the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you state your name, please?

A. Charles B. Hart.

Q. Mr. Hart, what was your business or occupation on August 6, 1944?

A. I was in the United States Coast Guard, assigned to the Engineers' Division as an investigator. [156]

Q. Just tell us what your duties included as an investigator.

A. Investigations.

Q. And from whom would you take your orders for investigations?

A. The captain of the port. I was under his command. And, also, the district engineer's office.

Q. Who would you make your report to after making an investigation?

A. To the engineer's office and to the parties concerned.

Q. Mr. Hart, were you called upon at any time, during the evening of August 6, 1944, to make an investigation of an accident happening on the S. S. Frank G. Drum?

A. I was.

Q. And when were you first notified of this assignment?

A. Approximately five minutes after 10:00 on August 6th.

Q. Is that p. m.?

A. P. m.

Q. The night of August 6, 1947?

A. Yes, sir.

Q. Where were you when you received your notification?

A. The Coast Guard Base Headquarters, Wilmington.

(Testimony of Charles B. Hart)

Q. From whom did you receive your assignment? [157]

A. The duty officer in operations at the Base.

Q. And, upon receiving your assignment, what, if anything, did you do?

A. I went to the scene of where the reported accident took place.

Q. And was that the Bethlehem Steel yards?

A. Yes, sir.

Q. Did you actually go aboard the S. S. Frank G. Drum? A. I did.

Q. Can you tell us about what time you went aboard the Frank G. Drum?

A. Approximately 10:30 to 10:45 p. m.

Q. When you went aboard this tanker—that was a tanker, wasn't it? A. I believe it was, sir.

Q. When you went aboard this tanker, did you see someone injured? A. No, sir.

Q. You didn't see Mr. Richardson there at the time, did you? A. No, sir.

Q. In making your investigation, what, if anything, did you do? Just tell the court what you did.

A. Part of it will have to be said in hearsay.

Q. Well, just this— [158]

A. I went to the aforementioned hatch under discussion, on the port side. I was informed that a Coast Guardsman had—

Mr. Gallagher: If your Honor please, we will object to any statement based on hearsay.

Mr. Hon: Your Honor, I think that is proper hearsay.

(Testimony of Charles B. Hart)

Mr. McHose: He can tell what he did and what he saw.

Mr. Hon: Yes.

Q. Tell us what you did and what you saw.

A. I went to the port side of the vessel—

Q. You understand this blueprint, don't you?

A. I do.

Q. I call attention to X-2, or X-3 it is, which purports to be a bunker hatch. Did you go directly to this bunker hatch? A. I did.

Q. When you got there, was the bunker hatch open or closed? A. It was open.

Q. And at that time were there any lights over it?

A. Yes.

Q. And where were those lights placed?

A. You speak in the plural form.

Q. Light or lights.

A. There was a light, as I recall it, above that hatch and a little 'midships. [159]

Q. Was that a portable or a stationary light?

A. I believe it was portable.

Q. Did you see any members or talk to any members of the crew that were on the Frank G. Drum that night?

A. I spoke to two crew members.

Q. Who were the members of the crew?

A. A Mr. Schleef and a Mr. Basango, I believe his name was.

Q. Do you know what the capacity of Mr. Basango was on the ship?

A. He identified himself to me as boatswain on the vessel.

(Testimony of Charles B. Hart)

Q. And what about Mr. Schleef?

A. Chief engineer.

Q. Did you have a conversation with them concerning an accident to David Richardson? A. I did.

Q. Separately? A. I believe so.

Q. Take the conversation you had with Mr. Schleef. When did you have a conversation with him?

A. Some time after arrival aboard the vessel, within a matter of minutes.

Q. And where did you have that conversation?

The Court: What did you say his name was, Schleef? [160] How do you spell it?

Mr. Hon: I think I have the spelling. It is s-c-h-l-e-e-f.

The Court: And his capacity was what?

Mr. Hon: Chief engineer.

Q. Who was present at the conversation, as you recall?

A. There is a possibility that Mr. Cannam was present, a lieutenant in the Coast Guard.

Q. You are not sure whether he was present or not? He might have been? A. I don't definitely recall.

Q. And what was the conversation?

Mr. Gallagher: That is objected to as hearsay and it wouldn't be competent.

Mr. Hon: The purpose of this question is to show knowledge on the part of the members of that stand-by crew, or whatever the crew was called, on the Frank G. Drum, that night of the condition of this hatch at the time that Richardson fell in it, and that they were employed by the Tide Water Associated Oil Company, a corporation, and they had knowledge of the condition, and

(Testimony of Charles B. Hart)

it is for the purpose of knowledge and showing that they had sufficient time to put guards or lights before the accident.

Mr. Gallagher: It is hearsay. [161]

The Court: Why?

Mr. Gallagher: Because it is testimony outside of the presence of the defendant. There is no evidence proving or tending to prove that either one of these men was hired for the purpose of having a conversation with the Coast Guard, as agents of the company. They are extrajudicial statements.

The Court: As a matter of fact, they were agents and servants of the company. were they not?

Mr. Gallagher: For a certain purpose but not for the purpose of having a conversation with somebody after an accident happened.

Mr. Hon: Your Honor, I submit the only way a corporation can have knowledge of a condition such as this is through certain employees who were there for that very purpose. In admiralty, the rules are relaxed, and I have this case with me that I told you about yesterday, and, if there is any question about it, I will submit the case to you.

The Court: Even though the rules were not relaxed, wouldn't that be part of the *res gestae*?

Mr. Hon: Why, certainly; it would be part of the *res gestae*.

Mr. Gallagher: Of course, Mr. Hon will agree to anything your Honor suggests which might lead to a ruling in his favor, but it wouldn't be *res gestae* for this reason and a very simple reason: *Res gestae* means only those spontaneous [162] statements which are made

(Testimony of Charles B. Hart)

without any time to think or cogitate about the matter, and any conversation which takes place after an event has transpired, and the conversation or statement is not a part of the res which is under investigation, then the statement is not part of the res gestae.

The Court: It seems to me that a corporation can act only through its agents and servants. If these people were there on the ship and were the stand-by crew, they were acting in some capacity in behalf of their employer, or, I assume, if they were members of the crew, they were employed as such. And any statements that were made by them I think are competent and material unless you have a direct authority that you would want to quote or read to the court to the contrary.

Mr. Gallagher: I think you could find lots of cases. I didn't anticipate that your Honor would take the view that you have taken with reference to the particular subject matter.

The Court: Possibly, if the boat were individually owned, the situation might be different or might not; probably not. There might be some argument there. But I believe that any conversation with members of the crew would be competent.

Mr. Gallagher: Then, for the purpose of the record, may it be stipulated, if the court agrees, that this entire line of [163] testimony, that is, any testimony that calls for conversations with members of the crew, is deemed to be objected to upon the grounds that I have stated? Is that satisfactory to your Honor?

Mr. Hon: That is satisfactory.

Mr. Gallagher: Is that satisfactory to your Honor?

The Court: That is, the chief engineer?

(Testimony of Charles B. Hart)

Mr. Gallagher: I mean anybody with whom he had conversations.

The Court: Make your stipulation covering this witness.

Mr. Gallagher: That is just this witness; yes.

The Court: Then, you may make a similar objection to another witness.

Mr. McHose: So that the record can be clear, or will be clear, Mr. Gallagher, can we stipulate that the chief engineer of the ship was a Mr. Schleef? That is in accordance with your answers to the interrogatories.

Mr. Gallagher: Yes.

Mr. McHose: In the employ of the Tide Water Associated Oil Company?

Mr. Gallagher: Yes.

Mr. Hon: What is the question, Mr. Reporter?

(Question read by the reporter.)

Q. By Mr. Hon: I will repeat, let's have the conversation. [164] tion.

A. I questioned Mr. Schleef regarding the purported accident and he stated that the hatch had been left unguarded, that is, open; that workmen had been working there from the yard workmen for several days. He criticized them for not having it closely guarded. At the same time, he knew that the hatch had apparently been left unguarded over a period of days.

Q. Did he say whether or not—

Mr. Gallagher: Just a minute. I move to strike out, separately, this part of the answer, "At the same time, he knew that the hatch had been unguarded over a period of several days," upon the ground that that states a conclusion and opinion of the witness.

(Testimony of Charles B. Hart)

The Court: That may be stricken.

Mr. Hon: Yes.

Q. Did he say or make any statements with reference to how long it had been open?

A. Several days.

Q. Did he make any statement with regard to whether it was lighted at the time of the accident or not?

A. I would like to refer to that report.

Q. Do you have it? A. I have.

Mr. McHose: Is this a report which you made at the time [165] of the accident, Mr. Hart?

A. Yes, sir; that is right. This was the memorandum report I submitted, or a copy of it that I submitted, to the engineer's office. There is the heading.

The Court: What is the last question?

(Question read by reporter.)

Q. By Mr. Hon: Have you referred to your report?

Mr. McHose: The question is did he make any statement as to whether it was lighted.

A. No; the statements were that it had not been lighted.

Mr. Hon: He stated that it was not lighted at the time of the accident.

Q. Is that right? A. That is right.

Q. You say you had a conversation with Mr. Bangsango? A. Yes.

Q. You said he was the boatswain?

A. Yes, sir.

Q. And when did you have that conversation?

A. Some time between 10:30 and 11:00 p. m. of that day.

(Testimony of Charles B. Hart)

Q. And where did you have that conversation?

A. On board the vessel.

Q. And who was present at that conversation?

A. There is the possibility that Mr. Cannam was present [166] and there might have been Mr. Schleef.

Q. Let's have the conversation.

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and it is not competent evidence in fact and no proper foundation laid.

The Court: Overruled.

Mr. Gallagher: When I refer to foundation, I don't mean the time, place and persons present. I mean there is no evidence proving or tending to prove that the boatswain had any authority to make any statements for or on behalf of Tide Water. It would not be binding on Tide Water.

The Court: He, I understand, was employed by this corporation?

Mr. Gallagher: Yes; he was, your Honor.

The Court: The objection is overruled.

Mr. Gallagher: May we have the same stipulation with reference to the boatswain as we had with reference to Mr. Schleef?

Mr. Hon: What was that?

Mr. Gallagher: That the objection goes to the entire line of testimony.

Mr. Hon: Oh, yes.

Mr. Gallagher: Is that satisfactory to your Honor?

Q. By Mr. Hon: Answer the question. What was the conversation? [167]

A. He identified himself as boatswain of the vessel. He said that he heard cries of help emanating from the

(Testimony of Charles B. Hart)

hatch and went to the hatch in question and saw Richardson trying to pull himself up the ladder from the hold. On further questioning and discussing it with Mr. Basango, he said the hatch was left open and unguarded and unlighted and, further, that the port passageway was well lighted.

Q. Did he say for how long this port bunker hatch, into which Richardson fell, had been left open?

A. Only for a period of several days.

Mr. Hon: You may take the witness.

Cross Examination

Q. By Mr. McHose: Mr. Hart, this accident occurred on a Sunday evening, is that correct?

A. I don't recall the day of the week, sir.

Q. It was August 6th? A. Yes, sir.

Q. And it was that same evening that you boarded the ship? A. Yes, sir.

Q. Who was on board the ship when you were there?

A. A Lieutenant Cannam, R. C. Cannam, and Ralph French.

Q. Who was he?

A. A Coast Guardsman who was a photographer assigned to the captain-of-the-port's office, the aforementioned Mr. [168] Schleef and Mr. Basango.

Q. Did you see anyone else on the ship?

A. I don't definitely recall. However, it seems to me like a number of people were aboard at the time I was there.

Q. Did you talk to any other members of the crew of the ship besides Schleef and Basango?

A. Not that I recall, sir.

Mr. McHose: That is all.

(Testimony of Charles B. Hart)

Q. By Mr. Gallagher: Mr. Hart, you don't know who placed that portable light there by the bunker, do you? A. No; I don't.

Q. It was there when you got there?

A. It was, sir.

Q. Can you describe that light so that we will know what kind of a standard it was?

A. I am afraid I can't give you much of a description except to say that it appeared to be rigged up perhaps 12 or 14 feet above the deck and that it cast good illumination on the port side of the vessel.

Q. May I see that report a moment, please?

A. Yes, sir.

Q. Did Mr. Schleef tell you that the workmen employed by Bethlehem had been doing work in and about that particular hatch for several days?

A. He said that workmen from the shipyards had been do- [169] ing work there.

Q. And Mr. Schleef, according to this report, you say, blamed the Bethlehem Shipbuilding employees?

Mr. McHose: Just a moment, Mr. Gallagher,—

Mr. Gallagher: Well, you want the conversation. Now we will get it all.

The Court: This is the first time we have had you gentlemen cross each other.

Mr. Gallagher: Your Honor has ruled that the conversation is admissible. If part of it is admissible, all of it is admissible.

Mr. McHose: No, your Honor. Your ruling is based upon the fact that the statement of an employee of the Tide Water Associated would be admissible, but the state-

(Testimony of Charles B. Hart)

ment in which he attempts to criticize some other party, by whom he is not employed, would not be admissible.

The Court: Let's start all over again. This witness referred to his notes for the purpose of refreshing his recollection in relation to some questions as to whom he discussed this matter with when he went on board. Now, the question is how this memo came into being so far as we are concerned.

Mr. McHose: That is right.

The Court: I think you should confine your cross examination to the matters concerning which there has been testi- [170] mony.

Q. By Mr. Gallagher: Have you given all of the conversation that you had with Mr. Schleef?

A. All that I recall, sir.

The Court: If there are other matters that you wish to inquire into, I am not foreclosing you.

Q. By Mr. Gallagher: Refreshing your memory by reading this down here, commencing with "Schleef"—

Mr. McHose: The point simply is, your Honor, whether it is admissible for this witness to testify as to a conversation he had with an employee of Tide Water Associated Oil Company, in which that employee blamed someone else for an accident that had happened. Obviously, he might very well have said it and probably would try to place the blame on someone else, and my objection is that the witness cannot testify as to a hearsay conversation with someone, in which that person blames another person for an accident that happened. As to the other statements he made, about the absence of lights and about the fact that the place was unguarded and that the hatch was open, I think your Honor ruled cor-

(Testimony of Charles B. Hart)

rectly on. Those were admissions against interest which are properly admissible by this plaintiff as being the employees and representatives of Tide Water Associated Oil Company, but now you are going far afield of that when you allow testimony to be given as to what this man said about the reason [171] why this accident happened and blaming someone else for it.

The Court: That was part of the same conversation—

Mr. McHose: It doesn't make any difference, your Honor. A statement of that kind couldn't possibly be binding on the Bethlehem Steel Company because he is not employed by them. He could testify to what those conditions were but now you are going to the point where he is being asked to give an opinion as to what happened and how the accident was caused, and that wouldn't be admissible even as against Mr. Gallagher and certainly not as against the Bethlehem Steel Company. He wasn't employed by us. Any statements that he made that have to do with us would certainly not be binding on us.

The Court: What is your theory?

Mr. Gallagher: My theory is this. If the evidence which your Honor permitted the libelant to introduce with reference to these conversations is competent proof of knowledge that the bunker hatch was unguarded and was unlighted, then I think that the balance of the conversation is certainly admissible because, if Mr. Schleef told this witness, "Yes; that bunker hatch was being worked on by the employees of Bethlehem and they evidently went off and left it unguarded and unlighted, and it is up to them to take care of it if they are working in that part of the ship," I think that part of it would, likewise, be admissible.

(Testimony of Charles B. Hart)

The Court: I think there is something to the point made [172] by Mr. McHose, that, if this person was not employed by the Bethlehem Steel Company, any statement he might make would not be binding upon his company.

Mr. Gallagher: I thought your Honor ruled that question was *res gestae*.

The Court: I did in so far as your people are concerned, because he was an employee of the company.

Mr. Gallagher: If it is *res gestae*, it is binding on everybody.

The Court: That is one element I haven't ruled upon. I just asked you the question whether it wouldn't be part of the *res gestae* and you argued it wouldn't. However, I ruled it was competent, nevertheless. I am not quite sure whether it was a part of the *res gestae*. It probably is. Whether or not the statement of this individual made at that time would be binding upon his own employer—I am not so sure that it might not be part of the *res gestae*.

Mr. Gallagher: You can't keep out part of a conversation and let in a portion of it if it is admissible for any purpose, and I am offering it for any purpose for which it is admissible. I am not making any conditions at this time with reference to its effect or weight or anything else. We are not arguing the case at this time.

Mr. McHose: There is another reason why this cannot be admissible. Even if this man was sitting here on the witness [173] stand being questioned, he couldn't express an opinion as to the fault for this accident. We are in admiralty and there is no jury here. What the

(Testimony of Charles B. Hart)

man was going to say is that he has expressed an opinion that the Bethlehem Steel Company was to blame. That is purely an opinion of the Tide Water Associated Oil Company.

The Court: Did this statement you are trying to get from the witness refer to facts or does it refer to his expression of an opinion?

Mr. Gallagher: I got the impression that Mr. Hart came to the conclusion that Mr. Schleef was blaming Bethlehem for having left the bunker hatch unguarded and unlighted, if anybody should be blamed, but I doubt very much whether Mr. Schleef used the same words that Mr. Hart has put in his report, and I am trying to find out what the conversation was which led Mr. Hart to come to the conclusion that Mr. Schleef blamed Bethlehem.

The Court: Let's hear the question and then I can tell whether it is competent or not.

A. Will you repeat that last question, please?

Q. By Mr. Gallagher: Have you refreshed your recollection, by reading from the name 'Schleef' at the bottom of the page down to the end of the first paragraph or down to this word here?

A. Would you like to know the conversation with Schleef? [174]

Q. In other words, what was the conversation that led you to put that line in there?

A. The general conversation was that the yard workmen going in and out of those holds all the time and opening various hatches wouldn't use caution to guard them or put up guard rails around them or properly

(Testimony of Charles B. Hart)

light them, and that he, Schleef, couldn't go around following those workmen up in eliminating such hazards.

The Court: That is a mixed answer.

Mr. McHose: I have no objection, your Honor. You are going to decide this case anyway. Obviously, this man would say, "It wasn't my fault and the other men did do it." I have no objection to it. Let it stand.

The Court: Very well. We will take a short recess of five minutes.

(Short recess.)

Mr. Gallagher: I have a couple of more questions I overlooked.

Q. Mr. Hart, the portable light that you found in the place that you have described was not rigged by either you or the photographer, was it?

A. No, sir; it wasn't.

Q. And, when you got there, the hatch had been roped off? A. Yes, sir. [175]

Q. There were lights around it?

A. I am almost certain there were, sir.

Q. Do you know whether the cover was on the stiff leg when you got there? A. I don't recall, sir.

Mr. Hon: I don't know what a stiff leg is.

The Court: I would like to know myself.

Mr. McHose: If the court please, and Mr. Hon, it is this rod here which is on the underside of the hatch, and that can be put in a socket down here and it will be partway opened.

The Court: It acts as a prop?

Mr. McHose: Yes.

The Court: Is there anything further from this witness?

(Testimony of Charles B. Hart)

Redirect Examination

Q. By Mr. Hon: By the way, Mr. Hart, as to this report that you have with you, is this an exact copy of a report that you made and furnished in excess care?

A. Yes, sir.

Q. And this is a part of the official records of the case?

The Court: Is it?

A. To my knowledge, it is.

Q. By Mr. Hon: This is an exact copy of the report that you turned in, is that right? [176]

A. It is, sir.

Mr. Hon: I will offer this as libelant's next succeeding exhibit.

Mr. McHose: It is a report this witness made himself and he was properly permitted to use it to refresh his recollection and testify from. He has testified to all the substantial matters in it. It is not identified as an official record and, even if it was an official record, it would still not be admissible in evidence.

Mr. Gallagher: I object to it as not competent in the case.

Mr. Hon: In view of that, I will withdraw my offer.

The Court: Very well.

Mr. Hon: I have no further questions.

The Court: How many more witnesses do you have?

Mr. Hon: I have another witness and then I have some interrogatories.

(Testimony of Charles B. Hart)

The Court: How many witnesses do you have?

Mr. McHose: We have two witnesses, one of whom will be very brief, and a doctor will be here at 2:30 this afternoon.

The Court: Is there a likelihood we will be able to finish this afternoon?

Mr. McHose: I don't think so, your Honor.

Mr. Gallagher: I expected Mr. Schleef and a master to be [177] here but Mr. Schleef was held up at sea on account of storms, and so was the master. So the master won't be in San Francisco until tomorrow. I am informed that Mr. Schleef is trying to get down here by air today. He had a reservation on the 11:00 o'clock Western Air from San Francisco, but I talked to an executive of the company at San Francisco and he told me it was very stormy up there. I have got three other witnesses here.

The Court: The reason I am asking is that I have a case set for tomorrow and, if there is no likelihood of reaching that case, I want to advise counsel and the litigants in the matter.

Mr. Gallagher: I think we will be going forward with testimony tomorrow, your Honor.

The Court: Call your next witness.

Mr. Hon: Yes, your Honor. I will call Admiral Higbee.

ADMIRAL FRANK D. HIGBEE,

a witness for the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you please state your full name, sir?

A. Admiral Frank D. Higbee, of the Coast Guard, retired.

Q. Were you an active officer in the Coast Guard during [178] World War II? A. Yes, sir.

Q. When did you retire from that service?

A. The 1st of August of last year.

Q. That would be August 1, 1946?

A. Correct.

Q. How long were you in the Coast Guard?

A. Since 1924.

Q. Over what period of time do your military operations or experience extend?

A. Since 1913, my time has been divided in the Navy between the American Merchant Marine and the Coast Guard, over a period of about 33 years.

Q. What has been your experience in the Los Angeles Harbor area?

A. Before this war, I had two other assignments here, in ships, and, in 1940, I left a job as captain-of-the-port up in Oregon and was assigned here in this area as captain-of-the-port of the Eleventh Naval District harbors.

Q. How long did you continue to be captain-of-the-port of this Eleventh Naval District?

A. Approximately two years.

(Testimony of Admiral Frank D. Higbee)

Q. Now, Admiral Higbee—

A. Pardon me. I may say I came here in 1940 but I was not captain-of-the-port until 1941. [179]

Q. I will ask you whether or not rules are promulgated or regulations are promulgated for tank vessels within the Los Angeles-Long Beach defensive sea area.

A. By order of the Secretary of the Navy, some local rules were ordered to be put out for vessels and shipping within the defensive sea area here, and there was a separate volume for tank ships which I prepared.

Q. Are you the one that actually prepared the orders?

A. Yes, sir.

Q. And you say there was a separate one regulating tank vessels? A. Yes, sir.

Mr. Hon: While a lull is going on, may I ask the court if Mr. Hart, the last witness before this gentleman, may be excused?

The Court: Do you require him any further?

Mr. McHose: That is agreeable.

Mr. Gallagher: Yes, sir.

The Court: You may be excused.

Q. By Mr. Hon: Disregarding any longhand notation or writing on the outside of the cover, I will ask you what that particular pamphlet is.

A. This is a printed copy of regulations for tank vessels within the Los Angeles-Long Beach defensive sea area as published at the Headquarters and printed at the Headquarters [180] of the Eleventh Naval District.

Q. Is Wilmington in that particular District or Headquarters? A. It is within that District.

Mr. Gallagher: You mean San Pedro.

(Testimony of Admiral Frank D. Higbee)

Q. By Mr. Hon: Is San Pedro also within that District?

A. Both of them are within that District.

Q. Are those the orders of the captain-of-the-port that were in effect on August 6, 1944?

A. The special local regulations that were prepared were prepared under the authority of Executive Order No. 8953 of the President.

Q. You mean the President of the United States?

A. Yes; I do. And they only lasted until that executive order was rescinded, which I found out just a few days ago was in July, 1946, after the surrender.

Q. So, then, were those in effect then, on August 6, 1944? A. Presumably so.

Q. Well, were they in effect on that date?

A. I believe they were, sir.

Mr. Hon: I offer this—

A. It is a companion volume to regulations for ocean and coastwise vessels, and the regulations for ocean and coastwise vessels are also applicable, in part, to tank vessels. And [181] this is also a companion to a little book which regulates waterfront petroleum facilities; those three things.

Q. This is the one that regulates the tank vessels?

A. Yes, sir.

Q. Or what we call tankers? Is that right, sir?

A. Yes, sir.

Mr. Hon: I offer this as libelant's next succeeding exhibit.

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that those rules and regulations promulgated by the captain-of-the-port are not a basis

(Testimony of Admiral Frank D. Higbee)

of civil liability and do not and cannot furnish a basis for a cause of action for damages for personal injuries. If these regulations are law because of the fact that they were promulgated pursuant to an executive order of the President of the United States, the court takes judicial notice of them anyhow, so that it would not be necessary to offer them in evidence. But, if it is necessary to offer them in evidence for the purpose of calling them to the notice of the court, then we have our objection that they do not furnish any basis whatever of tort liability and they do not and cannot create any duty or obligation on the part of the respondent Tide Water Associated Oil Company toward this libelant, and a failure, if any, to comply with the rules and regulations **would not be** breach of any duty which the Tide Water Associated Oil [182] Company owed to this libelant.

Mr. Hon: In that respect, your Honor, I might state this—

The Court: Will you tell me what portion of those rules you are referring to when you desire to have this introduced in evidence?

Mr. Hon: Yes; I will be pleased to.

The Court: What do they concern?

Mr. Gallagher: Before Mr. Hon does that, might I add a separate ground that we also object to them, to the particular rules to which you have reference, upon the ground that the libelant is not a person or a class of persons or one of a class of persons for whose bodily safety or protection these rules were promulgated?

Mr. Hon: In answer to your question, your Honor, we particularly have reference to Rule No. 6, which appertains to guards required to be on tankers at specified

(Testimony of Admiral Frank D. Higbee)

times, which would include, we contend, the time the accident happened, and, particularly, to subparagraph f of No. 6, which states, among other things, what the specific duties of the guards on ships shall be and who they shall be.

The Court: Are you talking about persons or some other kind of guards?

Mr. Hon: The guards; that the executive order absolutely requires a human being, an actual person. [183]

In answer to Mr. Gallagher's statement that this would not apply to this case or was not promulgated to apply to the safety of a libelant such as in this action, we contend that that would be a question of fact for the court to determine, first whether or not there was a breach of the orders of the port or the rules of the port, as set forth by the captain-of-the-port. Then, if your Honor should determine there has been a material breach of any of these particular rules, which were required by President Roosevelt, appertaining to this port, then your Honor would determine, as a matter of law or a fact, whether or not there was a causal connection between the breach and the injuries received by this libelant.

The Court: Do these rules have the force of law?

Mr. McHose: I might state our position to be, your Honor, that I think the evidence is perfectly admissible. The rules were promulgated under the presidential order and the authority of the Secretary of the Navy. Every tank vessel coming into this port is absolutely bound to follow those regulations and, if they do not, they can be subject to penalties. Is that right, Admiral Higbee?

A. That is correct.

(Testimony of Admiral Frank D. Higbee)

The Court: The basis, however, for the adoption of these rules is the authority vested in the President, is that correct?

Mr. McHose: That is right. [184]

Mr. Hon: Pursuant to the War Powers Act.

The Court: Is that correct?

Mr. Hon: The War Powers Act.

The Court: And these rules were enacted under that authority?

Mr. Hon: Under that authority; yes sir.

The Court: It seems to me they would have the force of law. Would they not?

Mr. McHose: I agree, your Honor.

The Court: Mr. Gallagher?

Mr. Gallagher: Well, if we assume that they have the force of law, I can call your Honor's attention to an elementary principle. I can give you an example by referring to ordinances. Suppose there is a city ordinance that says there shall be fly catchers in each corner of a room. Now, obviously, those fly catchers wouldn't be required in that corner of the room for the protection of people walking along the floor and, if you didn't have that fly catcher up there and a man got hurt on the floor, he couldn't complain about it because that ordinance is not adopted for the purpose of protecting the man on the floor. One might say several of these regulations were not promulgated for the purpose of laying down rules which were required to be followed for the purpose of protecting men in the Coast Guard. As a matter of fact, President Roosevelt had no authority whatever to make [185] any rule or to authorize the making of any rule which would impose a civil liability

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in the event the rule were not followed. In other words, one can do that—

The Court: That is a matter of legal interpretation, is it not? For example, you have mentioned a city ordinance in relation to a damage matter. If, for example, a pedestrian violates a traffic rule, isn't that indicative of negligence on the part of that pedestrian?

Mr. Gallagher: Certainly, because that ordinance was enacted for the purpose of controlling traffic and for the purpose of making the streets safe for pedestrians.

The Court: Isn't this the same situation? Here is a rule adopted for the safety of individuals who are either employed or whoever they may be. Wouldn't that be a similar situation?

Mr. Gallagher: If the President had the authority to do it and if he did it for that purpose, that would be one thing, but the President of the United States, whether it be Franklin Delano Roosevelt or Theodore Roosevelt or anybody else, has no authority whatever to legislate or to adopt anything which has the force of law and which will be the basis of a cause of action for damages on the civil side of the court. If a man violates or a company violates a wartime regulation, the company may be subject to a fine, for instance. But I don't think your Honor has gotten the point that [186] I make with reference to these regulations. My point is not at this time that they have not the force of law. They may have the force of law. My point is that they were not promulgated for the purpose of protecting individuals who might go aboard a ship.

(Testimony of Admiral Frank D. Higbee)

The Court: That is a question of law, is it not, that is before the court, to determine whether they would apply in that particular respect?

Mr. Gallagher: That is correct, but your Honor can't admit them in evidence. They are not evidence of anything.

The Court: If, however, some lawful regulation has been promulgated which would require certain safeguards on board a vessel, I would think that would have considerable to do with the question of negligence.

Mr. Hon: Your Honor, it sets forth the standard of care that is required on these vessels and your Honor can read the rules and see if that standard of care was lived up to by these parties.

Mr. McHose: It is very important in this case because it will assist the court in deciding this case on the question of responsibility as between the two respondents.

The Court: We haven't come to that yet. I think it is competent evidence. May I take a look at them for a moment? Are there any particular portions of this you desire to emphasize? [187]

Mr. Hon: Not at this time, your Honor. That will be in argument.

The Court: This may be received and marked Libellant's Exhibit No. 6 in evidence.

Mr. Gallagher: Your Honor, there seems to be some doubt about whether we have to take exceptions to rulings on the admiralty side. It was my understanding that you do have to do so. The clerk told me that his understanding was otherwise. But, in order to make certain that this particular ruling is properly protected,

(Testimony of Admiral Frank D. Higbee)

I, respectfully, take an exception to the ruling of the court.

The Court: An exception may be noted.

Mr. McHose: Exceptions are not necessary.

The Court: I doubt whether they are necessary because the Rules of Civil Procedure provide—

Mr. McHose: Formerly the rule on the civil side was that you had to save your exceptions.

The Court: However, if you feel that you are in doubt about it, you may note your exceptions.

Mr. Hon: That is all, Admiral.

Cross Examination.

Q. By Mr. McHose: Admiral Higbee, I would like to ask you a few questions about these rules. Will you state to the court what the practice was and what the requirements were with respect to the maintenance of guards on board tank vessels [188] which were not in service but were in the shipyard undergoing repairs?

Mr. Gallagher: That is objected to on the ground it calls for the conclusion of the witness. If it is a matter of law, he can't express any opinion, and, if it isn't a matter of law, he is not competent to testify to it.

Mr. McHose: I will lay a foundation by the witness if you don't stipulate to his qualifications.

Mr. Gallagher: He is not an expert in the law.

Mr. McHose: I intend to ask him questions as to the matter of practice and custom.

The Court: If that is regulated by the regulations, isn't that a matter of law and regulation rather than practice? The practice has been incorporated into a law or a regulation.

(Testimony of Admiral Frank D. Higbee)

Mr. McHose: I think that is true.

The Court: And that would be self-explanatory, would it not?

Mr. McHose: Yes. But I think we might be permitted to bring out that the practice has been incorporated in these regulations.

The Court: But I don't see the necessity of that. If this is understood to be a valid regulation pursuant to law, that speaks for itself. Then it becomes a physical fact as to whether that rule has been complied with. [189]

Mr. Gallagher: It is not proper cross examination, either.

Mr. McHose: I will make the witness my own for that purpose. What I offer to prove is, I would like to have the testimony of this witness, for the benefit of the court, to explain what guards are provided on vessels in the situation in which this vessel was at the time, what the duties of those guards were and what their general functions were.

The Court: What is the provision that you have there of the rules? What does that say? You might read this.

Mr. McHose: Regulation 6 states that, "While alongside docks, tank ships will maintain armed guards at all times as follows: The armed guards may be of the crew or of an approved organization from ashore." I would like to ask some questions about how these guards are provided and what they do. His position as captain-of-the port here, your Honor, qualifies him particularly to know just what guards do on board ship and what their functions are, and I think that is important and would be helpful in supplementing the statements here in the regulations. That is my purpose. I think it would help you, to

(Testimony of Admiral Frank D. Higbee)

decide this case, to understand who provides the guards and what they do.

The Court: The objection is overruled.

Q. By Mr. McHose: When a vessel is in a shipyard and a guard is not on the ship, that is, the full guard, do you [190] know what guards are maintained on the vessel?

Mr. Gallagher: The same objection to this entire line as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McHose: Will you read that question, Mr. Reporter?

(Question read by reporter.)

A. I know what the requirement was. It was required that there would be one licensed officer, and at night, or when the vessel was immobilized, in addition, the three guards required by paragraph 6 of this book.

Q. By Mr. McHose: Was there a gangway guard required?

Mr. Gallagher: The same objection.

The Court: Overruled.

A. There was a gangway guard required.

Q. By Mr. McHose: And was there also what is called a roving guard required?

A. That was a requirement.

Q. Will you describe to the court what the function of a roving guard was?

A. A roving guard was probably or was the most important of all. He was a man not assigned to guard any certain prescribed portion of the vessel but was at liberty and it was his duty to go throughout the vessel. He was a man that was supposed to be instructed in his duties. It was his duty to be responsible and to be resourceful to

(Testimony of Admiral Frank D. Higbee)

safeguard the premises [191] from jeopardies which might come from without or from mishaps which might occur within by just normal happenings or by negligence or careless operation.

Q. Were those guards required to be on duty at all times in 1944? A. Yes, sir.

Q. Who was required to provide those guards, Admiral Higbee?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion and opinion of the witness.

The Court: I am not quite clear now. When you asked the former question as to the requirement of these guards, is that within the rules? If it isn't within the rules, I would like to have that clarified a little better. Who required those guards?

Q. By Mr. McHose: The guards are specified by these rules, are they not? A. They are required.

Q. And are there also not other rules and regulations which cover guards, for instance, rules and regulations under Title 33 of the federal regulations?

A. Those are national rules you speak of now?

Q. Yes, sir. And these are the local rules we are talking about here now? A. Yes, sir. [192]

The Court: I think your best evidence would be those other rules.

Mr. McHose: I agree, your Honor.

The Court: Are those other rules available?

Mr. McHose: They are in the code of federal regulations.

The Court: I think that is the best evidence.

Mr. McHose: Those are federal rules but these local rules are still applicable here in Los Angeles Harbor.

(Testimony of Admiral Frank D. Higbee)

Q. Is that right?

A. These local rules are not applicable now because, since the surrender, an executive order No. 8953 was, I think, rescinded, which knocks the bottom out of any local rules.

Q. But they were effective on August 6, 1944?

A. Yes, sir.

Q. And all of the ships coming into this harbor at that time had to go by those rules, is that correct?

A. Yes, sir.

Mr. Gallagher: At this time evidently this subject matter has been exhausted and I move to strike out the testimony on cross examination and each question and the answer to each upon the ground that each answer states a conclusion and opinion of the witness and is not competent proof of anything.

The Court: If your inquiry concerned the contents of the rules, the number of guards and their duties and all that, [193] I think this evidence is not competent. I think you should resort to those rules.

Mr. McHose: All right, your Honor; we will rely on the rules, which I think are sufficient.

The Court: That objection may be sustained as to those particular questions.

Mr. McHose: But the rules themselves have been admitted in evidence.

The Court: These rules are admitted.

Mr. McHose: And they will speak for themselves.

Q. Admiral Higbee, I would like to ask you another question. In your capacity as captain-of-the-port, did you have anything to do with the duties performed by Coast Guard inspectors on board ships? A. Yes, sir.

(Testimony of Admiral Frank D. Higbee)

Q. You have been here during the testimony this morning, have you? A. Yes, sir.

Q. And you have heard the testimony of Mr. Richardson? A. Yes.

Q. Did the men who performed that kind of function, which he has described, come under your jurisdiction when you were captain-of-the-port? A. They did.

Q. What was the primary function of those men? [194]

A. The primary function—or it was their duty to go on board vessels and check up to see that the requirements for guarding and other safeguards were being complied with by vessels and by all sorts of marine installations and, also, on their own, to be vigilant for other jeopardies they might see. Those guard duties were not required by Mr. Richardson there, I don't believe. It was not their duty to stay on board and guard the vessel. He was a roving inspector who went from one ship to another to ascertain if the requirements were being met with.

Q. To determine whether there were crews on board, for example?

A. That would be one of their duties.

Q. And to determine whether there were fire extinguishers on board? Would that be one of their duties?

A. That would be one of their duties.

Q. Admiral Higbee, you have had a great deal of experience in connection with ships in your 33 years of service, is that correct?

A. I have a working knowledge of them.

Q. Do you have an opinion, Admiral Higbee, as to whether it is safe practice for a man to go out onto a dark deck of an oil tanker at night, without any kind of a light, and to attempt to walk along that deck?

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: First of all, that is not within the scope of [195] the cross examination.

Mr. McHose: I have already made Admiral Higbee my own witness.

Mr. Hon: All right. We object to that because Mr. McHose is asking this witness, who is now his witness, to assume the functions of this court.

The Court: The objection is sustained.

Mr. McHose: Your Honor, I have qualified Admiral Higbee as an expert.

The Court: Yes, but this witness can't pass upon legal questions.

Mr. McHose: That is not a legal question, your Honor. I have asked this witness, who has had 33 years' experience in connection with ships, whether he has an opinion that it is safe for a man, as a practical matter, to go out and walk on a darkened deck of an oil tanker at night, without a light. He is entitled to express an opinion to that question as an expert witness.

The Court: Have you any authority along those lines? If you have, I would like to see it.

Mr. McHose: I haven't any here but it is obvious to me. The Court: It is not to me.

Mr. McHose: I could call any witness into this court, I believe, who was an expert shipmaster, and ask him whether he has an opinion about going out on the deck of a ship at night. [196]

(Testimony of Admiral Frank D. Higbee)

The Court: That is what the court is trying to arrive at from the facts in the case, as to whether or not it is safe.

Mr. McHose: But it is helpful for your Honor to know what is good marine practice, what a man who has spent years in this field knows on that subject. That is an opinion on a question of fact.

The Court: You might as well ask a witness in an ordinary negligence case if the person that was injured was negligent.

Mr. McHose: No; you couldn't ask the question that way but I could ask a witness in a negligence case, if I qualified him as an expert, whether it is safe practice to do a certain thing.

The Court: I would like to see some authority on that point. I will admit that is a very novel point.

Mr. McHose: I will be glad to obtain some authorities through the noon hour but I don't like to ask the Admiral to come in again. Mr. Gallagher explained that a safety engineer could be called and asked what is good practice and what is not good practice. This is the same situation.

The Court: I still think it is the function of the court to determine questions of negligence on the part of this libellant or not.

Mr. McHose: I don't want to impose on Admiral Higbee the necessity of coming back this afternoon. [197]

The Court: We can take his answer subject to the ruling.

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: Your Honor, I object to the answer going into the record because it is so clearly invading the province of this court that I don't even think that the record should contain his answer until they convince your Honor the answer is proper. Under the circumstances, I don't think it is right to this libelant to clutter this record up by making a decision that is up to this court.

The Court: The purport of this question is whether it is possible for this man to step out into the dark, is that it?

Mr. McHose: No, your Honor. We are talking about something that peculiarly has to do with ships and Admiral Higbee has spent a lifetime in connection with ships. I am asking him, as an expert, to express an opinion as to whether it is good marine practice for a man to walk around the deck of a tanker at night, in the dark, and I think that his opinion might be helpful to you in deciding this case. I think the question is proper and it might be helpful to you, and I will be prepared the first thing this afternoon to submit authorities in support of the question.

Mr. Hon: Your Honor, I assume that Mr. McHose knew that the question would be asked and he should have had his authorities present at the time, because he could rely on my objection. [198]

The Court: I will take the answer subject to a motion to strike.

Q. By Mr. McHose: Do you understand the question, Admiral Higbee?
A. Yes, sir.

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: There is one of two things. Is this supposed to be a hypothetical question? If it is, then, your Honor, I object to the question further on the grounds that all of the facts are not included in the hypothetical question. To properly put a hypothetical question, you must include all of the facts.

Mr. McHose: It is not a hypothetical question.

Mr. Hon: Then, I object to it as not proper.

The Court: I will receive the answer subject to your motion to strike.

Q. By Mr. McHose: The question was, Admiral Higbee, whether you have an opinion as to whether it is safe—

The Court: Not an opinion. I won't let you ask that question. But whether it is good practice or whether it is an accepted practice, or something along those lines. Whatever the practice may be, I think you can introduce evidence on.

Mr. Hon: May I take the witness on voir dire?

The Court: I think we had better take our noon recess. Then, that will give Mr. McHose time to get the authority before [199] he answers.

Mr. McHose: We will take just a very few minutes after noon.

The Court: Very well. Come back this afternoon, Admiral Higbee.

(Thereupon, a recess was taken until 2:00 o'clock.)

Afternoon Session

February 12, 1947

2:00 O'clock

(Same appearances.)

The Court: You may proceed. Have you Exhibit 6?

Mr. Gallagher: No; I haven't got it. Your Honor, yesterday, we were discussing this time charter and I can now state that the vessel was under time charter at the time this accident happened. The charter was amended and the document was actually executed on September 9, 1944, but it went into effect on July 6, 1944, an amended time charter, and the port of delivery was Los Angeles, California. Mr. Newell examined these documents at my office and I think we can stipulate to that without putting in this entire photostatic copy.

Mr. McHose: Mr. Gallagher, I would like to know what your purpose is in putting in this time charter. I see nothing whatsoever to be gained by it and I don't see how it is [200] relevant or competent in this case. I would like to know what your purpose is in putting it in.

Mr. Hon: I don't think it would be proper to put it in at this time.

The Court: Hold that until we get through with this witness and then we will go into that matter.

Mr. Gallagher: All right, your Honor.

Mr. McHose: If the court please, with respect to the matter that was under consideration at the time of the noon adjournment, I have checked the law during the noon recess. I was thinking this morning in terms of practice which we have in admiralty, which is quite common, where a judge wants an expert witness to assist him in connection with the trial of a case, if there are some technical questions involved. I will say even that the court can, in its discretion, permit almost any testimony to be intro-

duced by an expert who is particularly familiar with some subject, such as the deck of a tanker, through long familiarity with tankers; and it is entirely discretionary with the court as to whether the court thinks that the opinion of such an expert or the statement of such an expert as to what might or might not be negligence would be of assistance to the court in deciding the case. In the case of *Eastern Transportation Line vs. Hope*, which is a Supreme Court case, 24 Law Ed. 477, 95 U. S. 297, the rule is stated quite clearly. In that case a towage of some barges [201] was involved and an expert was called who testified as to whether the method of towage was good practice or poor practice. It is the same general subject. It is an opinion given by an expert on whether some particular thing is a dangerous thing or whether the way to do something is one way or another way. The Supreme Court states, very clearly, there, if the court believes such testimony might be helpful, it is proper for the court to admit it. [202]

So I am willing in this matter to leave it entirely to your Honor. I recognize that the question of what is negligence and what is not negligence is ultimately for your decision. If you think it might be helpful to have the opinion of an expert who would testify whether or not it is good practice or bad practice for someone to walk along the deck of an oil tanker in the dark, Admiral Higbee is here and we can ask him the question. If you don't think such testimony is necessary or would be helpful, it is all right with me. I don't want to urge it over the objection.

Mr. Hon: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Hon: Mr. McHose goes into a different field now, asking an expert what the practice is, when he qualifies

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Mr. Hon: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Hon: Mr. McHose goes into a different field now, asking an expert what the practice is, when he qualifies

his question whether or not he thinks something is negligent. I will cite *Thomason vs. Hethcock*, 7 Cal. App. (2d) 634, where it is said that an expert may give his opinion on any particular question involved in a case but that opinion cannot be accepted on the ultimate basic issue, for example, in a personal injury, whether the defendant was negligent. They said that conclusions of this type are for the jury to make. [203]

That wasn't Mr. McHose's question.

The Court: I don't think you need to argue that. I believe you are giving the correct statement of the law. I think, if this witness were asked, for example, a question as to whether or not it is customary for a man, on inspecting the premises, in the Coast Guard, to go through darkened quarters or hulls, that is probably a proper question as to custom, but, when you ask a witness as to what he thinks about it, whether he is an expert or who he is, as to whether or not it constitutes negligence, I think that is not within his province.

Mr. McHose: The Supreme Court case specifically answered the point Mr. Hon made; that, even if the answer is on the point of the ultimate negligence in the case, nevertheless, the expert can be permitted to give that testimony if the court believes it might help the jury or the court in making a decision. But I don't want to press the matter, your Honor. As I said, I think, as a matter of fact, and as I stated in the opening argument, I am going to submit authorities to your Honor which will in my judgment satisfy you there is negligence, as a matter of law, in roaming down a darkened deck at night.

The Court: There is no evidence that he was walking in the dark. He testified that he pulled the flap aside and there was a light illuminated that particular section but he [204] couldn't see ahead. He didn't walk, or he might

not have walked. If there had been a solid footing there for him, I don't know what he would have done. He might not have gone through that corridor. We can't speculate as to that.

Mr. McHose: I would like the opportunity to recall Mr. Richardson if there is any question in the cross examination about that.

The Court: Have I misstated the situation? He testified, as I recollect, that the light did illuminate that opening but beyond that it was dark.

Mr. McHose: That is the important thing, your Honor. He testified—

The Court: He took a step in that direction and he fell down the hold.

Mr. Gallagher: Not while the light was out there. We went over that quite carefully at the time we took the deposition and I think his testimony here was the same. He just pulled the flap back and let it close behind him and then everything was dark after that.

The Court: I don't know what your deposition shows but I think I state what the effect of the testimony was that was given. I think you might ask a question whether or not it was a custom or a duty, or whatever way you want to ask the question, to walk through darkened halls and corridors on board ship on an inspection tour. [205]

Mr. McHose: Would you like to have Admiral Higbee answer that?

The Court: I would like to have an answer to that.

Mr. McHose: Will you take the stand, Admiral?

ADMIRAL FRANK D. HIGBEE,

the witness on the stand at the time of recess, being previously duly sworn, resumed the stand and testified further as follows:

Mr. McHose: As I understand you, your Honor, the question you would like to have answered is whether it is customary for men making an inspection or whether it is their duty to go onto a dark portion of a ship, which is unlighted, and, for the purpose of this question, Admiral Higbee, I would like to have you assume that the deck where this man went was unlighted and dark; whether it would be necessary and whether it was a part of his duty to go out across the unlighted and darkened part of a ship, such as this.

A. You are asking for the customary practice, is that right?

The Court: Not only the customary practice but whether it was his duty so to do.

Mr. Hon: You have a compound question there.

Q. By Mr. McHose: Perhaps you can cover it in a general way.

A. That is a duty so to do, for an inspector to grope [206] through darkened passageways and to go everywhere throughout the vessel in order to discover jeopardies. His job and one of the impelling duties he has is to ferret out these jeopardies, and only by going into lighted and into darkened places is he going to discover these things. They were trained to do all manner of things to test the efficacy of the guarding efficiency of the ship. They would sometimes board ships over a dark side and come aboard just to test the efficacy of the guards. It was their duty and they had had instructions—I know, when I was captain-of-the-port, that we went almost any and

(Testimony of Admiral Frank D. Higbee)

everywhere and that paid off. It was by doing those things that we discovered these things which could be corrected and which would eliminate jeopardies to the workers and to the ship.

Q. By Mr. McHose: Admiral Higbee, if a person was required, as a matter of his duty, to go into a darkened part of a ship, was he given any instructions as to what kind of caution to use or how he should do that? Did you expect this man to walk out into the dark deck of a ship without being told where he was going?

A. A man who has what we call a ship habit knows that on any ship, and especially on a tank, there are many ring bolts, valves and obstructions on the deck of a ship. A man with a good ship habit and experience, when he comes from light into darkness, will possibly grope his way more carefully. [207] And, while I was captain-of-the-port, that was one of the things that they were given some training in. It takes a long while for a man to acquire that habit and have that ingrained in him so he will take that precaution.

Q. What do you mean by "that precaution"? I want you to assume that the line of duty called a man to go out onto the deck of a tanker. What would he do to take precautions against falling into an opening such as a bunker hatch or to avoid falling over a valve or tripping over a hatch line or any one of the many things that might be on the deck of a ship in a shipyard?

A. The most experienced man as he gropes his way along a ship, when visibility is impaired by partial or total darkness, grasps hold of an end rail or takes hold of something solid and he doesn't let go with one hand until he grasps something else.

(Testimony of Admiral Frank D. Higbee)

Q. He doesn't take a step without knowing what he is going to step into, does he? A. That is right.

Mr. Hon: Just a minute. I am going to have to object to Mr. McHose leading his own witness. That last question is very leading and it is his witness.

Mr. McHose: I forgot, your Honor, that it was my witness. I will reframe the question.

Q. What is the practice or custom as respects the taking [208] of steps when you are walking into a dark space or into a space where you can't see where you are putting your feet, to proceed cautiously, is the briefest way I can explain that?

A. Just as a man comes out of a darkened room or a darkened alley and walks into a lighted boulevard, he may pause a while and get accustomed to it.

Q. When you say that a man should pause, what is the purpose of that pause?

A. It was found definitely during the war that a man who had come out of a lighted room was no good at all as a lookout in darkness for at least 20 minutes. If an officer would leave a watch on the bridge and go into a lighted room and look at a chart, for 20 or 30 minutes after that he couldn't rely on his night vision, and this pause is similar to that. If he comes out of a lighted place, he must pause a while, and I think, if there was a medical officer here, he could explain that better, that there is a dilation of the eye that has to take place there and that pause gives a man time to adjust his vision from a light condition to one of partial or outside darkness.

(Testimony of Admiral Frank D. Higbee)

Q. Is the purpose of that to be able to see where you are going?

A. Yes. There generally always is some vestige of light by which you can grope your way cautiously.

Mr. McHose: I think that is all. [209]

Mr. Gallagher: May I see those pictures, please?

Q. Admiral, I would like to show you Respondents' Exhibit A, which is a photograph 'thwartship, just forward of the bulkhead, where this bunker hatch was located. That 'thwartship space is not a passageway, is it?

A. It wouldn't be commonly referred to as a passageway; no, sir.

Q. In other words, it would be possible for a person to go from the port side of the ship to the starboard side of the ship by climbing over all of these oil lines and valves and hatches and whatnot, but that is not the thing which was furnished for the purpose of going from one side of the ship to the other side of the ship?

A. This is an accessible way to go. If he did not go across there and, in order to go from one side to the other, I think he would have had to have gone—this is aft, isn't it? Q. No; that is forward.

A. He would have had to have gone quite a ways fore and aft along the deck in order to cross over. To answer your question, it is not a passageway but it is an accessible way. A tanker's whole deck is replete with hatches and ullages and pipe.

Q. By Mr. McHose: What is an ullage?

A. It is very much smaller than a cargo hatch. It is a [210] miniature hatch through which soundings are sometimes taken to ascertain the quantity of petroleum cargo in the vessel in that hold. Except along walks and

(Testimony of Admiral Frank D. Higbee)

catwalks such as we see up here, there is almost nowhere on a tank vessel and there are not obstructions.

Q. By Mr. Gallagher: That is why they have the catwalks elevated above the surface of the main deck, isn't it?

A. I will say that it is not. The reason that is up there is because seas break over the deck here and the bridge is forward and the mess room and quarters are aft, and they have to have an elevated position where they won't get struck by the seas lots of times. That is the primary purpose of it.

Mr. Gallagher: That is all.

Mr. McHose: I would like to ask one other question, if I may.

Q. Admiral Higbee, can you state whether it is customary or not customary to have fire extinguishers out on the deck of a tanker?

A. The common practice is to have the fire extinguishers inside shelter.

Q. Have you ever seen any fire extinguishers out on the open deck of a tanker in a place such as along the bulkhead of the after house there, which is shown in this photograph Exhibit A, that being the open deck of the ship? [211]

A. I have seen fire extinguishers out there but seldom. You will see fire extinguishers put out on the deck of a tank ship where small packages of inflammables are being handled. But that is not the place where they are commonly stowed.

Mr. McHose: I think that is all.

(Testimony of Admiral Frank D. Higbee)

Redirect Examination

Q. By Mr. Hon: Admiral Higbee, on the question of going from a lighted place to an unlighted place, a lot depends on how long you have been in the lighted place before you come into the dark, isn't that true? For instance, if you stay in a lighted room an hour and come out to the darkness, your vision is much more affected by the darkness than it would be if you walked right through a room and came out to the darkness in two minutes' time? Isn't that true? A. That is so.

Q. So, if I come from the other side of a door and it is dark in there and I walk through this court room, which is lighted, and go out to the dark, that is, momentarily, it isn't as if I sat in this room an hour or two hours and then go out to the dark, isn't that true?

A. That is the way I have found it.

Q. So, just walking through this room for a distance of 40 or 50 feet or a hundred feet, without stopping, and not reading or doing anything else, would have very little effect on one's vision, isn't that true? [212]

A. It would have less.

Q. Now, Admiral Higbee, it is true, isn't it, that, in leaving a lighted room, you make your pause after you get out into the darkness; that it is not before you get into the darkness? Isn't that true? You would go into the darkness and pause in order to get your eyes accustomed to the darkness?

A. That is the way I have done it.

Q. And that is your understanding of it, isn't it? A. Yes, sir.

Q. Admiral Higbee, is it customary for a tanker, when it is pitch dark or when it is dark, to leave a bunker hatch

(Testimony of Admiral Frank D. Higbee)

completely uncovered, without any guards around it or any light illuminating the hatch, when it is a question of the opening being two or three feet from a passageway out onto the deck, where the hatch is located?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness and invades the province of the court.

The Court: You say "Do you know if it is customary to leave a hatch open under these circumstances"?

Mr. Hon: Under these circumstances, yes.

The Court: You may ask him generally if it is customary but not with reference to any particular facts as in this case; a general question whether it is customary to leave it [213] open or closed.

Mr. Hon: Is it customary to leave these hatches open, unguarded and unlighted, on a ship at night?

Mr. McHose: I think you should add to the question that the ship was in a shipyard.

Mr. Gallagher: And working on a particular hatch.

The Court: I think these suggestions are well taken and you might do so as long as you are going to ask about a custom and surrounding circumstances, as in this case; that you should complete that question.

Mr. Hon: My question, your Honor, would go to the hatches being in such close proximity to open passageways. It might be customary to leave a hatch open at some place where it is not a couple of feet from a passageway, where the custom might be different under the circumstances.

Mr. McHose: You are getting into the matter of argument now.

The Court: Do you assume that all tankers are alike?

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: No; I don't have enough information on that subject to ask it, your Honor. I just don't know, your Honor.

The Court: I am wondering if the witness can answer that question.

A. The question may be answered by reference to the official ship rules and I will answer it also from my own knowledge. [214]

Mr. Gallagher: Just a minute. I object—

The Court: Just a moment. Do you object to that question? Will you repeat the question?

Mr. Hon: Will you read it, Mr. Reporter?

The Court: I think you had better reframe it because everybody tried to help you out there.

Q. By Mr. Hon: You have seen that center blueprint there, haven't you? A. Yes, sir.

Q. And you understand that is a bunker?

A. Yes.

Mr. Hon: What were the dimensions of that?

Mr. Gallagher: 4 by 6.

Mr. McHose: 4 x 6.

Q. By Mr. Hon: Is it customary, Admiral Higbee—

Mr. McHose: May I interrupt you to make sure that the Admiral understands that that is a bunker hatch leading to the port bunker? A. Yes, sir.

Q. By Mr. Hon: Is it customary, Admiral Higbee, to leave a bunker hatch, of the approximate dimensions of 4 feet by 6 feet at the top opening, and 36 feet 7 inches deep—is it customary, at night time, to leave such a bunker hatch opened and uncovered, without guards or railings, or without any illumination at all in the darkness, when it is within two [215] or three feet of an open passageway on a ship?

(Testimony of Admiral Frank D. Higbee)

Mr. Gallagher: Your Honor, that is objected to on the ground it calls for a conclusion or opinion and invades the province of the court and is not relevant to anything here in controversy. This ship was in a shipyard undergoing repairs. I think your Honor should tell counsel to include those elements in there and that they were working on that particular hatch.

The Court: You may add that to the question and the question may then be answered.

Mr. Hon: I will add this to the question—your Honor, I don't know; I thought I had the question the way your Honor wanted it. I will add to that that the tanker was docked for repairs. And assume there had been no repair crew working on that ship for a period of 29 or 30 hours. Would it be customary to leave such a bunker hatch uncovered, unlighted and unguarded, for a period of 29 to 30 hours, and at a time when it was dark and the floor was shadowed?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion and is incompetent, irrelevant and immaterial.

Mr. Hon: I will say this, your Honor. I think it is. I say that it is something for this court to determine. I am willing to withdraw the question completely and let your Honor determine that. [216]

The Court: I think that is not a matter of custom but it is a matter of regulation. There are some regulations governing that particular situation.

Mr. Hon: If there are regulations covering it, that takes care of it.

Q. Are there regulations covering that setup of hatches?

(Testimony of Admiral Frank D. Higbee)

Mr. Gallagher: Wouldn't the regulations be the best evidence of that? Mr. Hon: Yes.

The Court: You haven't that regulation here, that federal regulation, have you?

Mr. Hon: Is that contained in this?

The Court: Look at it and see.

Mr. McHose: I think we are getting into the same field we got into this morning but, if your Honor thinks it is helpful, I have no objection.

The Court: It is a field that has not been explored, apparently. He may answer the question the way it was asked, adding the other portions that you added to that question.

A. Tank ships and hatches are required by the established practices of prudent operation of a tank ship and by some regulations on the subject to be screened when opened. One primary purpose is when they are handling cargo.

Mr. Hon: But the fact that the ship is in a shipyard undergoing [217] repairs is not excluded?

A. The regulations do not so except when you have a tanker in a shipyard undergoing repairs. They do not waive that requirement.

Mr. Gallagher: I move to strike out the answer upon the ground that it states conclusions and opinions of the witness and is not competent evidence of any fact.

The Court: If that regulation is a fact, I think the answer is proper.

Mr. McHose: I would like to ask the witness a few questions about the regulations and show him the regulations and ask him to show us the regulation in the book that states that, and I don't think he will find such a regulation. The regulation you refer to I think refers to ullages and cargo hatches.

(Testimony of Admiral Frank D. Higbee)

The Court: I think I will sustain that motion.

Mr. Gallagher: Will your Honor entertain a motion to strike? The Court: The answer may be stricken.

Q. By Mr. Hon: Now, Admiral, I believe you testified you promulgated the rules as contained in these regulations for tank vessels. May I ask you, sir, whether or not they were promulgated with the sole intention of protecting property or were they also promulgated to protect risk to human life? [218]

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion or opinion of the witness.

The Court: Sustained.

A. Your Honor, may I clear up a point that seems not to be clear? There is an implication that I promulgated those regulations. Those regulations, as you will find in the back of the book, were promulgated by Rear-Admiral R. S. Holmes, the Commandant of the Eleventh Naval District, adding a little bit more than they had had for peace-time operation, in order to provide for the jeopardies of the war situation. They are not rules that I wrote. It is just a compilation of matter which we got from the National Petroleum Security Council and from the other operators and put together and, after they were approved by the military and the naval authorities, they were promulgated by the Commandant of the Naval District; not by me.

Mr. Gallagher: I move to strike out the statement of the witness on the ground it is a voluntary statement and is not competent evidence of any fact.

The Court: It may stand, that is, the remarks may stand. Do these rules contain all of the regulations regulating the conduct or maintenance of a vessel of this kind?

(Testimony of Admiral Frank D. Higbee)

A. Not maintenance, your Honor. These rules are brief rules which govern the conduct of a ship from the time it enters the naval defensive sea area until it departs. It doesn't [219] have all of the rules you will find for the old, big tank ships, which go into strength of materials and machinery equipment and electrical devices. These are rules which are almost entirely for the safeguarding of operations.

The Court: I have particular reference to that. In so far as inspection and safety of a vessel are concerned, do these rules contain all of the rules and regulations in that respect?

A. Not all of those as, for example, they don't go into boiler pressures and things like that. It is mainly guarding and unloading cargoes. There is quite a good index in the thing. Without the book, I am somewhat at a loss.

Q. What other book is there in existence that contains these rules? I mean other accepted rules?

A. There is the National Steamboat Inspection Rules, more popularly called the Rules of the Bureau of Marine Inspectors.

Q. Would those rules also disclose laws or rules regulating the operations in the handling of vessels of this kind, in the particulars with which we are concerned at the moment?

A. Those rules were almost void of any regulation as to requirements for guards. When the National Tank Ship Rules were written, those things were left to private operators, and we would have left it to the private operators out here, too. But the Secretary of the Navy came out here and made a survey [220] of this port and it was established on account of the hazards of the Long Beach-Los Angeles Harbor being much more than the ordinary

(Testimony of Admiral Frank D. Higbee)

port, on account of the congestion and because it was so much of an oil port. And, by his order, he required that we supplement the National Rules with some of our local. So we did not write all of those other rules. We just wrote this little book after consultation with the oil people, which supplemented the larger book, which went into everything.

The Court: Any further questions?

Mr. McHose: I should like to clear up something, your Honor, that may come up in connection with argument in reference to those rules.

Recross Examination

Q. My Mr. McHose: In Rule 20, Admiral Higbee, if you will look at it there, it refers to the screening of openings of ullage holes and cargo hatches, and I would like to make sure that this bunker hatch is not an ullage hole.

A. No; it is not; no, sir.

Q. An ullage is not a cargo hatch, is it?

A. It can be used as a cargo hatch when they put package goods down that, and it so becomes a cargo hatch when they put—

Q. If it was used for cargo, then it could be a cargo hatch? [221)

A. Yes.

Q. But, when it is used for bunkers, it is a bunker hatch? [221]

A. Yes.

Q. I would like to have you tell the court what the screen is that you refer to here. Is not that a screen designed primarily for fire protection, to prevent sparks flying into the compartments?

A. It is primarily for fire protection. It is made with two cross bars of metal rods for a small ullage, and the

(Testimony of Admiral Frank D. Higbee)

screens in the rectangular cargo hatches are almost identical with house screens that you would see to keep out flies.

Q. Those screens are not designed to prevent people or large objects falling into hatches, are they?

Mr. Hon: Just a minute—

A. They would support them, as I understand it—

Mr. Hon: Just a minute.

Mr. McHose: I will withdraw the question. I have no further questions.

The Court: Are there any further questions?

Mr. Hon. That is all.

Mr. Gallagher: No questions.

Mr. Hon: May this witness be excused?

The Court: Yes. [222]

Mr. Hon: Your Honor, at this time I would like to read certain—

Mr. McHose: Mr. Hon, I wonder if you would mind if we would put something in at this time out of order.

Mr. Hon: Not at all.

Mr. McHose: I was going to ask you if you would have any objection if Dr. Stephens and I looked quickly at Mr. Richardson's leg.

Mr. Hon: Oh, no; not at all.

Mr. McHose: I was going to suggest we might have a recess now, if that is satisfactory, and he can do it during that time and he could also look at the X-rays that were introduced yesterday.

The Court: Very well. We will take a recess.

(Short recess.)

Mr. McHose: May we put on Dr. Stephens, your Honor, out of order?

The Court: You may.

JOHN S. STEPHENS,

a witness for the respondents, being first duly sworn,
testified as follows:

The Clerk: What is your name?

A. John S. Stephens.

Direct Examination

Q. By Mr. McHose: Dr. Stephens, are you a doctor
of [223] medicine? A. I am.

Q. Where did you do your training?

A. I graduated from Stanford University, Medical,
in 1929. After finishing my internship, I took a year
residency at the Los Angeles General Hospital, in the
orthopedic service. Since then I have been on the or-
thopedic staff of the Los Angeles Hospital, the Torrance
Hospital and the Good Samaritan Hospital.

Q. Have you specialized in some particular field of
medicine, Dr. Stephens?

A. I have specialized in orthopedic and traumatic sur-
gery.

Q. Are you admitted to practice medicine in the State
of California? A. I am.

Q. Dr. Stephens, at my request, did you make an ex-
amination of Mr. Richardson, the young man who is sit-
ting in the court room here today, some time ago?

A. Yes; I did. I made two examinations.

Q. When did you make the first examination?

Mr. Hon: May I inquire just a minute before you
proceed? Is this the testimony of both respondents, Mr.
McHose, or just one respondent? I would like the record
to show.

Mr. Gallagher: We will join in the calling of the
witness. [224]

(Testimony of John S. Stephens)

Mr. Hon: Thank you.

A. I examined the patient first on August 27, 1945.

Q. By Mr. McHose: Where?

A. In my office.

Q. And what kind of an examination did you make. Doctor?

A. I gave him a rather complete examination.

Q. What do you mean by "a complete examination"? Tell us just what you did.

A. I examined him for his general skeletal condition and examined the movements of his extremities. I examined him for muscle strength, what we speak of as an orthopedic type of examination.

Q. Did you have X-rays made? A. I did; yes.

Q. Do you have those X-rays with you here in court?

A. I have.

Q. Did you obtain a history from the patient?

A. I did.

Q. Did that history contain a statement of an injury that he had received by a fall? A. Yes.

Q. And did you particularly examine him with reference to that particular injury? A. I did. [225]

Q. What did your examination show, Doctor?

A. Well, the examination at that time showed positive findings. They revealed a little restriction of knee motion, a little restriction of hip motion, and there was a little internal rotation of the right leg. The foot turned in a little bit. In other words, he was a little pigeon toed on that side.

(Testimony of John S. Stephens)

Q. Did your examination reveal that he had had a break of the right femur?

A. Yes, which at the time was healing and in good alignment.

Q. Were you able to tell what kind of medical treatment he had received for that fracture?

A. Well, I could tell from the X-rays that he had had bone reduction and a plate had been applied and then he had been placed in a cast following that, until the femur had united.

Q. What did you find with respect to the uniting of that femur?

A. At that time union was progressing very satisfactorily and he was bearing weight.

Q. Was he using at that time any crutches?

A. I don't think he was.

Q. What other things did you find in your examination?

A. I examined his back and know the back was straight. [226] He complained of tenderness over the fifth lumbar lamina. Forward bending permitted the fingertips to reach six inches from the floor. The lateral and backward bending was unrestricted. In other words, he had an essentially normal appearing back.

Q. Did you take any X-rays of the back?

A. We did; yes.

Q. Were there any positive findings?

A. There were none.

Q. Did the X-rays show a normal back condition?

A. Negative; yes.

(Testimony of John S. Stephens)

Q. Did you observe a scar where the operation had been performed in connection with the broken femur?

A. Yes; there was a well-healed scar on the outer side of the right femur.

Q. Did you find any objective findings at that time in respect to injuries resulting from the broken leg?

A. Only as I said before; he had some little internal rotation of the foot. He walked toed in on that side, and, of course, he had the scar; that was all. And he still had a little restriction of flexion of the hip and the knee. He hadn't regained that at that time.

Q. Can you state whether he had made normal post-operative recovery from this operation?

A. At that time I felt that he had made a good re- [227] covery.

Q. Did you at that time find any evidence there was permanent-partial disability as a result of this accident?

A. I felt at the time he would make a complete recovery with the possible exception of four or five degrees of rotation of the femur.

Q. Doctor, would that condition have any effect on his ability to work, let us say, as a machinist?

A. I don't believe that it would.

Q. Did you find anything further at that time, Doctor, that I have not covered in my questions?

A. Well, he at that time was also complaining some of his ankle, or his left heel, it was.

Q. Did you make an examination of that?

A. I had X-rays taken of that and couldn't find anything in the X-ray or in the examination of significance.

(Testimony of John S. Stephens)

Q. When did you examine him again?

A. I re-examined him on October 10, 1946, again in my office.

Q. And what kind of an examination did you make at that time?

A. I gave him the same type of an examination.

Q. And what did you find at that time with respect to the broken femur?

A. Well, I found no changes. It apparently had con- [228] tinued to heal in the manner in which it was healing at the time that I saw it. He was not complaining at the time of the femur.

Q. What did he complain of at that time?

A. At that time he was complaining primarily of swelling in his right leg. He stated that his "right leg swells up a lot when I walk around concrete. It aches through both hips and the back. The right leg swells up at night and it is down in the morning. I had a little patch of rash on the inner side of my right leg. It is now getting larger and itches a lot."

Q. Did you make an examination of the leg, Doctor?

A. I examined him in the same manner I had examined him before.

Q. Did you find some condition in the right leg you had not found before?

A. At the second examination I found that he had rather well-developed varicose veins on the right leg and, to a lesser degree, on the left leg. He had a patch of eczema, which is a scaling skin rash, over the lower part of the right leg, above the ankle, and he had definite evidence of incompetent veins in his leg. He had regained practically all of the motion of the hip and the

(Testimony of John S. Stephens)

knee, and an examination of his back revealed tenderness in a little different area than he had previously complained of. It was very slight and [229] it was up more in the region of the ribs on the left side. At that time he had full back motion and was able to bend forward and touch the floor with his fingertips.

Q. Doctor, did you find anything in either of your examinations that caused you to form an opinion as to whether Mr. Richardson has any permanent disability, confining it to the broken femur, the injury that he received?

A. Well, in a small sense, he has a permanent disability as a result of the fracture in that he does apparently have about five degrees internal rotation of the lower part of the leg. In other words, when the plate was applied to the femur, instead of getting the ends of the bone in perfect alignment, apparently they permitted, or over-corrected, let me say, the lower part of the leg, so that, instead of being in perfect alignment, there was a little rotation.

Q. Would that condition, Doctor, in your opinion, have any effect upon Mr. Richardson's ability to do work, let us say, as a machinist or on a farm?

A. I don't think it should; no.

Q. Dr. Stephens, do you have an opinion as to whether the fact that this plate is in his leg makes any difference so far as his general condition is concerned?

A. I don't think it does at all.

Q. Is it necessary or advisable, in your opinion, to remove that plate from the leg? [230]

A. No.

(Testimony of John S. Stephens)

Q. Will the presence of that plate in his leg affect his ability to work as a machinist or on a farm?

A. It shouldn't.

Q. Doctor, did you form any opinion as to the cause or the reason for the eczema condition on his leg?

A. Well, I feel that the eczema is a varicose eczema.

Q. What do you mean by that?

A. Well, it is an eczema that develops as a result of the impaired circulation to the skin, as the result of the varicose veins, which does not permit the blood in the veins to return to the heart in the normal manner. In other words, in a varicose vein, the blood runs in the wrong direction and the blood, for that reason, is not replenished with oxygen as it normally should be.

Q. Is there any medical treatment that could be given to correct that condition?

A. Well, the treatment for the condition is self-supporting bandages to keep that stagnant blood out of the extremity. The other method is to tie the veins and inject them. The most satisfactory method is the removal of the veins, simply take them out.

Q. Do you have any recommendation as to what ought to be done in Mr. Richardson's case?

A. I think in his case he should have the veins removed. [231] He should at least wear supporting bandages at all times.

Q. Do you believe, if this operation on the veins were conducted, that the eczema condition would be corrected?

A. The eczema would be considerably improved. He would have some permanent pigmentation there. I mean there would always be brown spots on his leg. The eczema will get better.

(Testimony of John S. Stephens)

Q. Would you recommend that operation be done?

A. I think it should be; yes.

Q. Can you state what is involved in that operation in the way of time, medical and hospital expense?

A. The operative procedure consists of opening up into the groin where the veins start, and tying them in that region, and then removing them through successive small incisions. It requires about four or five small incisions down the leg. The veins are then passed down and stripped out in three or four segments.

Q. Is that a very complicated or long operation?

A. The operation, for two men, I suppose should require an hour and a half.

Q. About what would it cost, Doctor?

A. Oh, I think three or four hundred dollars would be a good fee for it.

Q. Do you mean for the doctor's fee and the hospital cost?

A. I don't know. He would have to be in the hospital [232] two or three days.

Q. How long would it be before he could walk after the operation?

A. He could walk immediately after the operation. That is a part of the operation, to keep them on their feet.

Q. Is that a very serious operation, Doctor.

A. No.

Q. Do you have an opinion, Doctor, as to whether the condition of eczema or the condition of varicose veins

(Testimony of John S. Stephens)

which, as I understand you, cause the eczema, has any causal relation to the injury to the femur?

A. I don't think so. Varicose veins are very common. They can appear in the second and third decades of life. They usually do. Trauma or an injury is not considered as a factor. It is usually a hereditary thing or some intrinsic weakness in the muscles or the veins. We don't know what it is.

Q. Do you believe that, if Mr. Richardson had the operation, of which you spoke, for the removal of the varicose veins, the condition of his right leg would be materially improved?

A. I think it would; yes. He would have less swelling of the leg and his eczema would disappear.

Q. Doctor, did you, at my request, look at the X-rays which were introduced in evidence here yesterday as Libellant's Exhibits 4 and 3? [233] A. I did.

Q. Do those X-rays reveal substantially the same thing as are shown in your own X-rays?

A. Those are essentially the same pictures that I have for 1945, except that in these films the healing is now complete.

Q. In your films the healing is complete?

A. No; in these more recent films. You see, mine were taken two years ago and those films haven't yet shown a complete, solid union.

Q. Do these films show a complete, solid union?

A. Those do; yes, sir.

Q. Doctor, some testimony was given yesterday with respect to what the Doctor called an osteoma.

A. It is really a spur on the bone.

(Testimony of John S. Stephens)

Q. Do you have an opinion as to whether that bears any causal connection to the break in the leg?

A. An osteoma or an excess osteosis to the fracture, is one which one usually sees it in a fracture in the region of the femur, and is of no significance at all.

Q. Would it affect the person, who had such a thing, in any way whatsoever?

A. No; it couldn't possibly.

Mr. McHose: That is all. [234]

Cross Examination

Q. By Mr. Hon: Doctor, then, it is your professional opinion that the osteoma which you see in this X-ray that has just been shown to you was the result of an injury, is that true, sir?

A. It was the result of the injury; yes.

Q. Doctor, you examined Mr. Richardson about 20 minutes ago back in the anteroom, did you not?

A. Yes.

Q. What part of his anatomy did you examine?

A. I examined primarily his lower extremity.

Q. As a matter of fact, in examining his lower extremity this afternoon, you found that his condition was worse today than it was the last time you saw it, didn't you? A. In reference to his eczema; yes.

Q. Wasn't his entire condition worse, his leg?

A. His veins were, I believe, more prominent; yes.

Q. And, also, weren't the other conditions worse than when you last saw them? All of the other conditions you examined, the last time you saw him, were worse?

A. As I say, I only examined the lower extremity. I asked him to bend forward and he came to within about two inches of the floor with his fingers.

(Testimony of John S. Stephens)

Q. Doctor, where are the X-rays that you took of Mr. Richardson? [235]

A. I didn't take those. Those were taken at the Good Samaritan Hospital by Dr. Raymond Taylor.

Mr. McHose: We will let those go in.

Q. By Mr. Hon: Can you state from those X-rays what type of fracture he had to the femur, whether it was compound, simple or what?

A. You can't tell whether it was compounded. There may have been some degree of comminution. You rarely see a true simple fracture in that you have one fracture line. Sometimes there are little pieces of bone knocked off. A comminuted fracture is a fracture in which there are many fragments, characteristically as in a gunshot wound, where it shows the bone. That is essentially a simple fracture.

Q. Was it a complete break?

A. Oh, yes; it broke. There is no question about that.

Q. The purpose of putting that plate in was to hold it together again so it would grow back together, is that right?

A. That is the purpose; yes. It simplifies the treatment of a fracture of the femur to be able to put in a plate in there, although actually it doesn't always do it. It is, however, good treatment. There is no question about it. He has had good treatment.

Q. Dr. Stephens, varicose veins are, I believe you said, caused through bad circulation, is that true?

A. No; varicose veins are not. Varicose veins [236] are caused by the dilatation of the superficial veins in the lower extremities. There are two sets of veins. There are the deep veins which are surrounded by muscle and

(Testimony of John S. Stephens)

are supported by the muscles of the leg, and those veins depend to a great degree on the support of the muscles and the muscle action and the valves within them to return the blood to the heart. The superficial veins are these veins that become varicose veins.

Q. The superficial veins do not have the support of muscles?

A. They simply lie in the area under the skin and, if for any reason those veins become dilated or stretched a little bit or weakened and the valves within the veins fail to support this column of blood, then the veins begin to enlarge and, as they enlarge, then the valves within them no longer function and then it is essentially like you hang up a rubber container full of water. Eventually, if you hang it up long enough, it will continue to stretch and get larger, and that is essentially the picture of varicose veins.

Q. How long do you think he has been suffering from varicose veins?

A. Apparently, from my examination, about a year or a year and a half.

Q. Doctor, assume that this young man was in a Spica cast from his waist right down to his toes, a rigid cast, four [237] or five in all, over a period of nine months, what effect, if any, would that have upon that leg with respect to his veins?

A. It shouldn't have any effect. It shouldn't have any at all; no.

Q. That cast fits up tight against the leg, doesn't it?

A. Not necessarily; no, sir. I don't know what kind of a cast was put on.

Q. And what effect would it have on that condition you described as eczema?

A. I don't think he had eczema at that time.

(Testimony of John S. Stephens)

Q. Do you think the cast had anything to do with bringing on the eczema? A. No; I don't.

Q. Doctor, if he had been suffering from varicose veins say a year to a year and a half, which would have predated your first examination, is it your professional opinion that those casts, or being in that rigid cast, for a period of nine months, connotes in any manner, shape or form or would affect the condition of varicose veins?

A. No; it would not.

Q. Would it affect circulation any at all?

A. Probably only to improve it.

Q. To improve the circulation?

A. It might interest you to know that the treatment of varicose veins is the application of a very snug-fitting support [238] or a boot, a flexible type of cast. The legs do very nicely as long as they have a good tight support on them.

Q. How long is that support to be left on?

A. Of course, that is in the treatment of that.

Q. That is a temporary proposition for a few days, isn't it?

A. No. Some people wear supports for months and some of them years.

Q. Without taking them off?

A. You take them off every three or four weeks or a month maybe.

Q. Then, it is your testimony that, if he was suffering from varicose veins before this accident, and then the fact that he was for nine months in these casts, completely encasing his right leg, it would not have effect at

(Testimony of John S. Stephens)

all either on the eczema condition or the leg condition, is that right?

A. Of course, he didn't have the eczema condition. He has only had that recently. And, as I understand it, he didn't have any eczema on his leg, not when I saw him in 1945, and at that time he was out of the cast. I don't see how it could have entered the picture at all. I mean I can't answer that question.

Q. May I ask you, Doctor, the word "trauma" means injury, doesn't it? A. Yes. [239]

Q. And it is so applied to injuries received by some accidental means? A. Yes, sir.

Q. Are varicose veins ever caused by a disturbance to the veins or are varicose veins produced by a trauma?

A. Not the veins; no.

Q. Is it your testimony that trauma is never a contributing cause even to varicose veins?

A. A trauma can be a contributing cause in one sense.

Q. What is that sense?

A. And that is, if, for any reason, a trauma would cause an occlusion of veins, and in that manner set up an infection and close the deep veins, then that might then require the blood to circulate through the other veins and produce varicosities.

Q. Doctor, did you find any angulation in the right femur at the fracture site?

A. There is an angulation of a degree or two. It is hard to tell without taking a picture of the other femur how much there was. There sometimes is a normal bowing of a femur, you know. I think there is probably a degree or two; yes, sir.

(Testimony of John S. Stephens)

Q. And isn't it true that the angulation of the femur causes the knee to bend in somewhat?

A. I don't think—no; not the angulation of the femur, [240] As I said, there is about four or five degrees of rotation. Angulation is this and rotation is this. I don't think the rotation is important.

Q. What part does the angulation have upon the knee with regard to the motivity?

A. None unless it is quite marked.

Q. Doctor, you state that the right foot is turned inward?

A. I said about four or five degrees; yes, sir.

Q. That makes it what you would call pigeon toed, is that right?

A. Yes; he walks pigeon toed.

Q. Doctor, what effect does that have upon his walking?

A. He walks pigeon toed. That is the story.

Q. If he walks pigeon toed, that is the normal gait for a man, isn't it?

A. Not all men. It is abnormal in his case.

Q. And he will walk pigeon toed in that respect all the rest of his life, in your opinion, won't he?

A. I think to a degree; yes.

Q. And, Doctor, it is true that that pigeon toed condition materially affects his walking, isn't that true?

A. Oh, I don't think it slows him down at all.

Q. Would you say it would tend to tire the man more so than if he had a normal gait? [241]

A. No; not unless he did a great deal of walking.

Q. Doctor, scoliosis can be caused by a trauma, can't it?

A. No.

(Testimony of John S. Stephens)

Q. You have never heard of it?

A. No, with one exception. I am referring to true scoliosis, which is a deformity of the spine. A true scoliosis is not caused by trauma.

Q. There are some conditions that we see in a very painful sprained back, when a person has muscle spasm on one side of his back and pulls away over to the side that caused the scoliosis?

A. No. That condition we sometimes refer to as an acute scoliosis but it is something that runs only a day, a day or two. There is no traumatic scoliosis that I know of.

Q. They call that a scoliosis for this reason—isn't it a fact that a scoliosis is an abnormal curvature of the spine laterally or sideways? A. Yes.

Q. In other words, if I walk like this, bent over to my right, for four or five blocks, that is going to temporarily cause an abnormal lateral curvative of the back, isn't that right?

A. But it will clear up. If you walk over to the side, by virtue of the fact you are walking over to the side, you are producing a curvature, but that is not a scoliosis. [242]

Q. But you often refer to it as an acute *scoliosis*, don't you?

A. I have very rarely heard the term.

Q. But it is often referred to as an acute scoliosis, isn't it? A. Not often; no.

Q. But it is, isn't it? A. Not in my opinion.

Q. Then, what did you mean by saying it would cause an acute scoliosis?

A. Only if, for instance, I stood up and I were to sprain my back, let us say and, as a result of this sprain,

(Testimony of John S. Stephens)

I would hold myself in a position, bending to the right or to the left, to protect that injured portion of my back for a few days. I think, then, you might call that an acute scoliosis.

Q. Doctor, assume that David Richardson, the man you examined first in August, 1945,—assume that one year prior to that date, or August 6, 1944, in walking, he stepped into an open passageway and fell straight down for a distance of 36 feet and 7 inches and landed on his feet and in a sitting position, in your professional opinion what, if any, effect would that have upon his spine or his back?

A. Well, it might hurt it or might not.

Q. Your professional opinion is that it would hurt it, isn't that true, sir? [243]

A. He could hurt it.

Q. Your best opinion is that it would hurt it?

A. Oh, no; not necessarily. By falling 36 feet, 7 inches, it would depend entirely on how he fell. I should say in this particular case he must have lit probably on his heel of the right leg or he wouldn't have probably broken his leg and that, in itself, probably broke his fall considerably.

Q. But Doctor, assuming that he didn't break his leg until he hit the hard surface at the bottom of the 36 feet, 7 inches.

A. I simply can't become too involved in this form of discussion because I don't know how he fell.

Q. I am giving you what the testimony shows. Assume that he did fall straight down for 36 feet and 7 inches and landed on his feet in a sitting position and with sufficient force to break his right femur completely in

(Testimony of John S. Stephens)

two. Is it your testimony, Doctor, that, in your professional opinion, that wouldn't cause any pain, injury or damage to the small of the back?

A. That would depend entirely on how he fell. You see, he lit on his feet in a sitting position. That I can't answer.

Q. That would, in your professional—

A. He could sustain a very severe back injury or none at all. [244]

Q. And he could sustain a severe enough back injury that it would produce this so-called acute scoliosis, isn't that right?

A. Oh, he could have; yes. He could have had an acutely sprained back from it, which would have been painful for days.

Q. You say he had a restricted motion in the knee. I assume you mean a restricted motion in the right knee?

A. Yes.

Q. How much restriction was there?

A. I think it was five degrees the last time.

Q. That was the last examination? A. Yes.

Q. In what direction was the restriction?

A. In the bending.

Q. In the bending? A. Yes, sir.

Q. That is, bending the leg backwards?

A. Yes, sir.

Q. Doctor, what effect, if any, does that restricted motion have upon his walking or his gait?

A. It would have none on his walking or his gait.

Q. But it would materially affect his knee in causing it to tire easier than a normal knee, wouldn't it?

A. No. The only way that could cause him trouble would be, if he assumed a full squatting position, he prob-

(Testimony of John S. Stephens)

able wouldn't [245] squat quite as far with one buttocks as he would with the other.

Q. Doctor, assuming a full squatting position with that limitation of motion, isn't it true that would cause pain in that right knee? A. Not necessarily; no.

Q. Doctor, you made a statement a while ago that the condition you found yourself wouldn't be sufficient to prevent him from doing the work of a machinist. When you made that statement, what was your opinion as to what a machinist did?

A. Well, I am reasonably familiar with the work of a machinist.

Q. All right. Just tell us.

A. Well, they do considerable stooping and squatting and bending. They use wrenches. They use sometimes heavy wrenches. They do a lot of bending work. They do some lifting, although some of the very heavy lifting with the machinists I know of is done with a winch.

Q. Assume, Doctor, that Mr. Richardson was a machinist helper prior to entering the service of the United States Government; in other words, that was his last occupation before going into the Coast Guard, and assume that in that work he was often required to be on his back, to climb ladders, to bend, stooping, and lifting articles weighing as much as a hundred and two hundred pounds; is it your testimony, Doctor, [246] he could work a straight 40-hour week at that trade, that is, Doctor, without discomfort?

A. Oh, he may have some discomfort for a while, until he got used to it, but I think he could do the job.

Q. And do you think the discomfort would be very slight, is that right?

A. He may have some discomfort; yes.

(Testimony of John S. Stephens)

Q. What discomfort would he have?

A. Until he got used to this particular type of work, he would have possibly some in his knee, if he forced it beyond that degree of flexion that we referred to, until he regained full flexion. I think, in a very short time, he would get the full flexion of his knee if he used it a little more. He might have some discomfort on heavy lifting, real heavy lifting.

Q. Doctor, in examining a patient, you have two kinds of symptoms, do you not, the objective and subjective symptoms?

A. Yes, sir.

Q. And isn't it true your objective symptoms are, like your X-rays, something you can see by the eye or feel or observe?

A. Yes, sir.

Q. And the other symptom is a subjective symptom?

A. Yes, sir. [247]

Q. And that is something you take a patient's word for?

A. That is what the patient tells you; yes, sir.

Q. And it is true that pain is a subjective symptom, isn't it?

A. Yes, sir.

Q. And this young man having fallen in the manner that I have heretofore described to you, for a distance of 36 feet and 7 inches, you could not state that he was not suffering from severe pain in his back at this time, could you, as a positive fact?

A. From my examination, I didn't feel he was having severe pain in his back. If a patient is suffering from severe pain in the back, they usually have some objective symptoms in their picture which show they have muscle spasm; they are not able to stand up straight or they are not able to bend forward. And the straight leg raising

(Testimony of John S. Stephens)

is usually positive. In other words, they can't lift their heel up off the bed more than 20 or 30 degrees without severe pain in the back, and he didn't have either of those three at the time I examined him.

Q. Doctor, do you discount in your testimony the fact that he fell 36 feet 7 inches and landed in a sitting position with sufficient force to break that femur in half? Do you discount that in your testimony as having no value in the case at all or no bearing? [248]

Mr. Gallagher: That is objected to, your Honor, upon the ground that it is ambiguous and argumentative and unintelligible.

The Court: Overruled.

Q. By Mr. Hon: Answer the question, Doctor.

A. Repeat it, will you, please?

(Question read by reporter.)

A. I think, in a sense, you can discount it because he broke the femur, which means, in my opinion, that a great deal of force was transmitted to the femur when he fell, or he wouldn't have broken it. And, again, I say the height of the fall isn't of great significance in back injuries, and you either hurt them or you don't hurt them. And we very frequently see patients who have fallen from great heights and broken both arms and legs and no complaint of back injuries.

Q. And you frequently see patients where that is the only complaint they have, don't you?

A. Yes, indeed. But that, again, depends on how they fall. It is not the height.

Q. Doctor, how does a man have to fall 36 feet and 7 inches sufficient to cause severe pain in his back, then?

A. He doesn't have to fall only a few feet or he can fall a hundred feet and not hurt his back.

(Testimony of John S. Stephens)

I agree with you in this sense, that, if he falls [249] 36 feet, he can hurt his back, in fact he can kill himself very easily; but, on the other hand, he doesn't have to hurt his back.

Q. The point I am trying to get over is merely this, that falling that distance and landing in that position is sufficient to cause great pain in the back, isn't that true?

A. It depends on whether he did injure it or not.

Q. Now, Doctor, you stated that you found a restriction in the hip joint. A. Yes, sir.

Q. How much restriction was that?

A. It was about 10 degrees.

Q. 10 degrees' restriction in the hip joint? That is the right hip joint? A. Yes, sir.

Q. And that is on forward and backward motion but, on the other hand, —

A. No; that is bending it in this position.

Q. Raising the knee?

A. Raising the hip up like this. One knee will come up until he can almost get it to his chest and the other fails just by about 10 degrees.

Q. Doctor, what effect, if any, does the 10 degrees' limitation of motion in the right hip have upon his walking?

A. Nothing excepting in the full squatting position. [250]

Q. Doctor, would that be sufficient to cause pain in a full squatting position?

A. For a time; yes, until he regained his full degree of motion.

Q. Doctor, the combination of 10 degrees' limitation of motion in the hip and 5 degrees' limitation of motion

(Testimony of John S. Stephens)

in the knee, on the same side, and 5 degrees' rotation of the right foot inwardly, causing a pigeon toed effect,—wouldn't that combination of the three materially affect his walking?

A. I don't think the flexion of the knee or the limitation of full flexion of the knee, which is essentially this, and the full flexion of the hip, which is essentially this, a few degrees lost of those two movements—it is not going to affect his walking.

Q. Doctor, wouldn't the combination of those three things mostly affect his ability to work as a machinist, in doing the things I enumerated a while ago?

A. As I said before, the limitation of the hip flexion, and of the slight limitation of the knee flexion, might for a period of say weeks.

Q. It would make it a little more difficult for him to get into the full squatting position until he overcame that?

A. That might be days or weeks but that is the only way that it could.

Q. Doctor, is it your professional opinion that this [251] man today is not suffering from any pain whatever?

A. Oh, I can't say that he is not having some pain in his back.

Q. Your professional opinion, Doctor, is that he is having pain in that back, isn't that right?

A. I will have to take his word for it; yes, sir.

Q. And it is reasonable to your professional mind that he is having that pain, isn't it?

A. He can have some pain although I am not of the opinion it is very severe pain, according to my examination.

(Testimony of John S. Stephens)

Q. But you do, in your professional opinion, think he is suffering from a pain in the back today?

A. He says he is and he may be.

Q. In your professional opinion, Doctor, do you think that he tires easily on walking?

A. Oh, I don't think that this rotation of his foot would very materially affect his walking. It might affect his running or, if he were in athletics or trying to run over hurdles; it might handicap him. But I think for the usual daily ratio that he will come along pretty well, about as well as anyone else.

Q. In other words, you think, though he has a 10-degree limitation of motion in the right hip and a 5-degree limitation of motion of the right knee and a 5-degree limitation of motion of the right foot, that he is just as well off as before [252] the accident, is that right?

A. Oh, no; I didn't say that.

Q. All right. Tell us, then, how he is worse off than before the accident.

A. Well, he toes in, that is about all, and he can't squat. He probably couldn't get into the full squatting position, but one rarely gets in that position. It certainly isn't very important in your routine living.

Q. He will go through life, will he not, in your professional opinion, with some permanent disability?

A. Yes; he will toe in and in that sense he has some permanent disability.

Q. And you cannot state how long he will suffer pain in that back, can you?

A. No; but I am of the opinion that it won't last very long.

(Testimony of John S. Stephens)

Q. But that is strictly problematical, isn't it, Doctor?

A. Yes; but, without X-ray and other evidence of technical disability, I don't feel that this back condition will continue for any great length of time.

Q. Doctor, is your opinion affected any by the fact that it has been about 2-1/2 years since the accident happened and he is still suffering pain in the back? Does that affect your opinion as to how long he will suffer pain? [253]

Mr. Gallagher: Just a moment. That is objected to because it assumes as an actual fact the element that the libelant is suffering pain in his back.

Mr. Hon: The witness testified he was suffering, and I will refer to the question if that is the case.

Mr. Gallagher: No; he didn't. He said the libelant told him he suffered pain in his back.

Mr. Hon: I will withdraw the question.

Q. Doctor, assume that this accident happened approximately 2-1/2 years ago, and assume that Mr. Richardson is still suffering from pain, according to his testimony, that he is still suffering from pain. Does that affect your opinion as to how long he will suffer pain in the back?

A. My opinion would be influenced more or less by my examination. On two separate examinations I have noticed that he has had pain more or less in different areas of his back. In other words, the pain on the two repeated examinations has not been consistent, the point of pain. And, there being no objective findings and his back being as flexible as it is, I don't feel that there is going to be any permanent back disability.

(Testimony of John S. Stephens)

Q. Doctor, you stated, I believe, that the first complaint of pain was over the sixth lumbar vertebra.

A. Over the fifth.

Q. That is down in the small of the back, isn't that [254] right?

A. It is down in the small of the back; yes.

Q. And that would be the fifth vertebra up from the sacrum?

A. It is right in the small of the back, in the middle.

Q. Doctor, isn't it true, that you get more pain when you sprain your back over that region than other regions, except the cervical region, because of the excessive motion in that particular part of the back?

A. We are more apt to see back injuries in that region and that is because of the flexibility of that region. We don't know why it is.

Q. But it is there, isn't it?

A. I don't think that is the cause but, at any rate, that is the commonest place for pain in the back.

Q. As to this left heel, what were his complaints on the left heel that he made to you?

A. He says, "Well, it bothers me. My left leg bothers me. My left heel bothers me. My left heel, the bone is bruised and it aches all the time I am on it." That was two years ago.

Q. Doctor, his condition would affect his taking part in any type of a sport, any that required physical exertion, wouldn't it? [255]

A. I have already stated that certain types of sport—I should imagine he wouldn't be particularly good on the hurdles, but other things I imagine he could participate in.

(Testimony of John S. Stephens)

Q. Is a hurdle about the only thing you think he couldn't do?

A. I imagine that is one of the few things he wouldn't be very good at.

Mr. Hon: That is all, Doctor.

Redirect Examination

Q. By Mr. McHose: Doctor, I have two points I would like to bring out. If Mr. Richardson had injured his back at the time of this fall, would you expect that he would complain of back pain shortly after that?

A. As a rule, he would. It might be, in a sense, influenced by the fact that he was having more pain probably in his femur than he was in his back. I mean in that sense it might have masked his symptoms.

Q. If there is no mention made in the Naval Hospital record, Libelant's Exhibit 1 in this case, of any complaint of pain in the back from the period of August 7, 1944, through January 1, 1945, would that mean anything to you as far as determining whether he did actually injure his back in this fall?

A. Well, I shouldn't imagine that he had any severe injury or I am quite certain he would have complained of it. [256]

Q. Doctor, there is one other point. You have stated that there was a certain situation in which trauma might cause varicose veins and you explained that situation in some detail. Will you explain whether that situation exists in this case?

A. I don't feel that it does because he gives evidence of his deep veins being patent or open.

Q. Doctor, one other thing I wanted to ask you. You examined his left leg, too, did you not, when you made this examination?

A. Yes, sir.

(Testimony of John S. Stephens)

Q. Does he also have varicose veins in his left leg?

A. To a lesser degree, yes, sir, but they are developing.

Mr. McHose: That is all.

Recross Examination

Q. By Mr. Hon: Doctor, Mr. McHose asked you if your opinion was affected if he made no complaint of pain from the date of accident, which was August 6, 1944, to January 1, 1945—

Mr. McHose: I am merely referring to your exhibit.

Q. By Mr. Hon: Would your opinion be changed any by the fact that during that time, the small of his back—or that he was wearing a cast, a rigid cast, from the waist down all the way, keeping that entire right side rigid from the [257] waist down?

A. I have already stated that I think for a few days at least it would have masked the symptoms.

Q. Yes, but, Doctor, isn't it a fact that such a cast would have kept the small of his back in a rigid position and prevented it from making those rotating movements? Isn't that true?

A. Yes; in a sense, it would.

Q. And that would alleviate the pain greatly, wouldn't it, Doctor?

A. If he had had a sprain of the back, the immobilization and the rest would have relieved the pain; yes. But it just so happens that frequently people without back injuries, when put in a Spica cast, complain sometimes

(Testimony of John S. Stephens)

quite bitterly of their back for a period of days because of the position that we place them in. So I can't say definitely that it would be masked.

Q. Doctor, isn't it true that sometimes in an acute sprain of the small of the back, including the lumbo sacral region of the back, they often completely immobilize the small of the back? A. Yes.

Q. To alleviate the pain?

A. Yes. As I stated before, it will relieve the pain and gives them rest. [258]

Q. So, Doctor, to your professional mind, it would not be incredible to your mind professionally if this man did not have pain in the back until after he completely quit wearing the cast? That is highly probable, isn't it, sir?

A. Not highly probable but it is possible.

Mr. Hon: That is all. Well, just one minute—

The Court: Just one question. You examined him a short time ago and observed that discoloration in the lower part of the right leg, is that correct?

A. Yes; that is the eczema I am referring to.

The Court: Is that a skin condition?

A. That is a skin condition as a result of the varicose veins.

The Court: Is that curable?

A. As I said before, if the veins are eliminated or treated by one of many methods, the eczema will clear up, but it will leave some pigmentation on his legs.

(Testimony of John S. Stephens)

The Court: Does that affect any parts of the muscle?

A. No. It is purely in the skin. Of course, the skin in that region is very thin, it being directly on the bone, and for that reason this was probably more apt to be infected.

The Court: Do you know whether that eczema condition causes or did cause itching but which could be corrected by this operation that you speak of?

A. Yes, sir. [259]

Q. By Mr. Gallagher: Doctor, it is my understanding of your testimony that this young man's eczema and varicose veins have no relationship to the injury he received on August 6, 1944?

A. That is my opinion; yes.

Mr. Gallagher: That is all.

The Court: Is there anything further?

Mr. McHose: Nothing further.

Mr. Hon: I will stipulate the witness may be excused if you wish.

Mr. McHose: Thank you. I have one other witness I don't like to bring back tomorrow morning. You have all of your case in except the interrogatories?

Mr. Hon: I think I have.

Mr. McHose: Is that all right with you, Mr. Gallagher?

Mr. Gallagher: If he is a short witness. I would have one, too, but I doubt very much if we could accomplish anything in 20 minutes.

Mr. McHose: Mr. Harrington.

WILLIAM A. HARRINGTON,

a witness for the respondent Bethlehem Steel Company,
being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. William A. Harrington. [260]

Direct Examination

Q. By Mr. McHose: Mr. Harrington, are you connected with Bethlehem Steel Company? A. I am.

Q. What is your position?

A. I am assistant manager.

Q. What are your general duties?

A. I am in charge of repairs and, as a matter of fact, in charge of all of the work in the yard, the production work and, also, in charge of sales.

Q. How long have you been connected with ship repair work, Mr. Harrington?

A. My first employment in ship repair work was in 1923; January 1st.

Q. Have you been in it ever since that date?

A. At the same yard.

Q. Did Bethlehem Steel Company perform certain repair work to the tanker Frank Drum in July and August, 1944? A. They did.

Q. Where was that work done?

A. At the San Pedro yard.

Q. Was that done pursuant to an oral or a written agreement?

A. It was an oral agreement, with the price agreed upon. [261]

Q. Will you explain that to us?

A. I brought my brief case with me if I can have it. It is in the second pew there.

(Testimony of William A. Harrington)

Q. Yes.

A. During the war period, we were called upon by the operators of the ships and marine superintendents, who inquired as to whether we could undertake work. The work was generally allocated by a coordinator to ship conversion and repair. Many times, if an operator wished to get his ship into a particular yard, he would make contact with a man who had charge of taking the job and ask him if it were possible to get into the yard. In this manner, we would make contact then with the coordinator and tell him they wished to come in and the job would be allocated to our yard.

The Court: Do you want that information or was there some other information you wanted?

Mr. McHose: That is preliminary, your Honor.

Q. What we are interested in is this particular case, Mr. Harrington. How did the Frank Drum happen to come into the yard?

A. It came into the yard in that manner, in which the marine superintendent made application to me and I got hold of the coordinator.

Q. Who was the marine superintendent?

A. Oscar Lundin. [262]

Q. The marine superintendent of what company?

A. The Associated Oil Company.

Q. He asked you if you would repair the ship?

A. Yes.

Q. For whose account?

A. For the Texas Company, or I mean the Tide Water Associated Oil Company.

(Testimony of William A. Harrington)

Q. Did you then get the approval of the coordinator for that work?

A. I did get the approval of the coordinator for that work and have a form from the coordinator, dated July 21st authorizing us to oversee the repairs.

Q. Then were specifications prepared in the form of a sale order?

A. The first thing we received from the Associated Oil was a form carrying the C. M. P. allotment serial number, calling for the drydocking of the vessel and some normal underwater repairs. That was then followed up by a survey for some of the owner's repairs after the vessel arrived in the yard. It happened that there were some damaged plates on the ship due to collisions with the Army and the Navy, and surveys were held and we made an estimate of the probable cost to repair the work, and we agreed upon the price across the table.

Q. With whom did you reach that agreement? [263]

A. We agreed with Mr. Lundin, representing the Tide Water Associated Oil, and the underwriter surveyors as well.

Q. Were those agreements confirmed in letters?

A. They were confirmed in letters and copies were made.

Q. Do you have copies of those letters?

A. I have. You will also find with the copies of the letters the sales orders which form the specifications calling for the repairs.

Q. In other words, there are attached here in one file a number of letters of varying dates? These are copies

(Testimony of William A. Harrington)

of the letters that were in your file, that were sent to the Tide Water Associated Oil Company?

A. That is right. I had the girl copy those letters from my own office file copy that was made at the time she typed the original letter.

Q. And it was pursuant to the letters and this sale order that this work was done?

A. That is right.

Q. And the work was done for the Tide Water Associated Oil Company?

A. Yes; it was billed to them.

Q. And did they pay you for it?

A. They did.

Mr. McHose: I would like to offer in evidence the letters and the sale order and the agreement for the repairs in this [264] case. Is there any objection?

Mr. Gallagher: I don't have any.

The Court: They may be received. They should be perhaps designated as a Bethlehem Steel Company's exhibit rather than a joint exhibit.

Mr. Gallagher: I have no objection to it going in as a joint exhibit.

Mr. McHose: Then, it might go in as a joint exhibit.

(Joint Exhibit D.)

The Court: The witness used two designations. He used Associated and Tide Water. Is that one concern that you are talking about?

Mr. Gallagher: Yes; Tide Water Associated Oil Company.

(Testimony of William A. Harrington)

The Court: I just wondered if two different concerns were involved here.

A. Your Honor, it was the Tide Water Associated Oil but, for short purposes, we refer to them as Associated. That was the original name of the company until taken over by Tide Water.

Q. By Mr. McHose: Was there any other written contract between Tide Water Associated and Bethlehem Steel Company with respect to the work which you did on this ship?

A. I don't understand you.

Q. Was there any other written agreement, other than what we have put in evidence here, between Tide Water Associated [265] and ourselves? A. No, sir.

Q. This covered all of the work you did on the ship for Tide Water Associated Oil Company?

A. Yes, sir; that is right.

Q. At the same time, did you also do some work for the War Shipping Administration?

A. That is right; at the same time.

Q. In other words, there was some work that the War Shipping Administration ordered you to do for their account?

A. Yes; the War Shipping, as I understood, although I haven't it right in written papers. But I was informed that it was the intention of the War Shipping to allocate the ship to the Navy. And, since the Navy carried greater crews than were carried by commercial companies, they wanted the icebox increased in size and, also, the Navy wanted certain items of ordnance work carried out. This work we did for the account of the War Shipping.

(Testimony of William A. Harrington)

Q. You did that simultaneously to doing the owner's repairs? A. That is right.

Q. But you billed those repairs separately to the War Shipping Administration?

A. That was billed to the War Shipping Administration.

Q. In connection with the work that was done, was certain [266] work done which necessitated going into the port bunker tank?

A. Yes. That was one of the damage jobs.

Q. Was that work done for the account of the Associated Oil Company?

A. That is right.

Q. The War Shipping Administration had nothing to do with it? A. Nothing at all.

Q. Would you indicate on the contract letter here the part that covered that particular work?

A. This item, to renew the shell plate.

Q. This is on a letter of August 2nd?

A. A letter of August 2, 1944, entitled "Claimed U. S. Damage—No. 1."

Q. You are marking that with an "X"?

A. An "X" out here and this item here.

Q. The two items here, "Renew Shell Plate No. 5" and "Crop After End of Shell Plate No. 6"?

A. Yes, sir.

Q. It was necessary to do that, was it, as shown on that sales order? A. Yes, sir.

Q. Will you check on the sales order the same items?

A. That is these items here and internals. [267]

(Testimony of William A. Harrington)

Q. Mr. Harrington, pursuant to that contract, did the Frank Drum come into the Bethlehem Shipyard?

A. The Frank Drum was already in the yard when we made that contract.

Q. When that contract was made? A. Right.

Q. Did Bethlehem Steel Company at any time take the possession and control of that ship? A. No.

Mr. Gallagher: That is objected to upon the ground it calls for the conclusion of the witness.

The Court: Objection sustained.

Mr. Gallagher: And I move to strike the answer.

The Court: Motion sustained, or granted.

Mr. McHose: This witness knows, your Honor, whether the Bethlehem Steel Company took possession and control.

The Court: He may tell what was done.

Q. By Mr. McHose: When the ship came into the yard, did the Tide Water Associated Oil Company maintain a person in charge of the ship?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion of the witness. If he wants to testify he went down to the boat and saw somebody on there, that would be all right, but I think this question calls for conclusions.

Q. By Mr. McHose: Let me ask it this way. Do you have [268] an established practice and policy at the Bethlehem Steel Company with respect to the ships that come into your yard?

Mr. Gallagher: That is objected to on the ground it is immaterial.

(Testimony of William A. Harrington)

Q. By Mr. McHose: I will narrow the question down to this: so far as your undertaking to be responsible for such a ship is concerned.

Mr. Gallagher: That is objected to upon the ground it would be utterly immaterial whether they had a custom or practice of that kind.

The Court: That objection is sustained. It seems to me you can get at what you are trying to elicit from this witness—we know that this vessel came into that yard. That is the testimony. Now, what was done or who came aboard or what was done by the respective parties in connection with it? I think you can arrive at it in that manner rather than to ask questions which bear upon legal conclusions.

Mr. McHose: Your Honor, I would like to make an offer of proof by this witness. I offer to have him testify that the Bethlehem Steel Company has a long-established policy and custom in connection with all ship repairs that they will not at any time take responsibility or take possession or control of a ship which comes into the yard. There is nothing in this contract that covers the situation either way. The only provision in the contract so far as Bethlehem Steel Company [269] responsibility is concerned is they will only be responsible for something that is a direct result of their own negligence. This is a custom and a practice that all of the ship repair people and all of the ship owners are quite familiar with, and I make an offer to prove that by asking Mr. Harrington direct questions.

The Court: You may prove that if you can arrive at that situation with facts that you wish to elicit from this witness.

(Testimony of William A. Harrington)

Mr. McHose: How can I do so without asking him whether they took possession and control of the ship, which is a question of fact?

The Court: That calls for a legal conclusion.

Q. By Mr. McHose: Did you send anyone to that ship to take charge of it when it arrived in the yard?

Mr. Gallagher: That is objected to upon the ground it is compound and calls for a conclusion of the witness and is merely an attempt to go through the back door when blocked at the front door.

Mr. McHose: I think my offer of proof is proper and I think that question is also proper.

The Court: Did his company send someone on board to take charge? He may answer that first part of it but not the last part of it.

Q. By Mr. McHose: Did you send anybody on board the [270] ship when it came into the yard, Mr. Harrington?

A. Naturally, we always send foremen and superintendents aboard.

Q. What did those men do?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness unless he was there.

Mr. McHose: He is in charge of the shipyards.

Mr. Gallagher: I don't think that would make any difference. He can't give his conclusions as to what these superintendents did.

The Court: He may testify to what instructions were given to the superintendents.

(Testimony of William A. Harrington)

Q. By Mr. McHose: I will reframe the question and ask it that way.

A. We gave these superintendents the specifications and told them to go aboard the ship and carry out the work.

Q. And did they do that?

A. They did.

Q. Were there times when that ship was in the yard when there was no representative of your company on the ship?

A. On Sundays, when no work was carried out, or on Saturday nights and Sunday nights.

Q. Do you know who was on board the ship at those times?

A. I don't remember now. [271]

Q. Do you know whether the persons on board the ship were employees of someone other than Bethlehem?

A. I know that the ship operator must keep a skeleton crew aboard the ship.

Q. Was that done in this case?

A. That was done.

Mr. McHose: I think that is all.

Mr. Gallagher: Have you any questions?

Mr. Hon: Go ahead, Mr. Gallagher.

Cross Examination

Q. By Mr. Gallagher: Mr. Harrington, were you at the shipyard on Sunday night, August 6, 1944?

A. I can't answer that definitely.

Q. Do you remember the day of the accident involving this young man here?

A. No. The first information I had of it was on Monday.

(Testimony of William A. Harrington)

Q. Where do these vessels—withdraw that. This particular vessel was out of navigation during all of the time it was at your yard, isn't that right?

Mr. McHose: What do you mean by "out of navigation"?

A. The engine was dead and no power was generated.

Q. By Mr. Gallagher: It was there getting a general overhaul, wasn't it?

A. If you mean immobilized; yes. [272]

Q. Well, it was being repaired, wasn't it?

A. Yes.

Q. Just like you take an automobile in a garage and have it fixed?

A. No, not the same status.

Q. Whose yard was that?

A. It was the Bethlehem Steel Company's.

Q. Whose dock was it?

A. The Bethlehem Steel Company, as far as I know.

Q. And where did the ship get its electricity?

A. From the yard.

Q. From the Bethlehem Steel Company?

A. Right.

Q. In other words, there was no plant in operation on the ship or in the ship?

A. I can't swear as to that. They may have had an auxiliary running, using power from the dock.

Q. Well, do you know?

A. No. That is the reason I said I couldn't answer it.

Q. You said that on Sundays no employees of Bethlehem ever went aboard those ships or this particular ship?

Mr. McHose: He did not say that.

(Testimony of William A. Harrington)

Q. By Mr. Gallagher: Is it your testimony, Mr. Harrington, that there were no employees of the Bethlehem Steel Company aboard the Frank Drum on August 6, 1944? [273]

A. I can't say for sure. There may have been. That is a long time ago.

Q. Do you know the names of the individuals who came aboard that vessel after this accident happened and roped off the hatch and installed a light over it?

A. No; I can't swear that we did that.

Q. You don't know whether you did it or didn't?

A. I don't know.

Q. The reason you don't know that is because you don't know the names of the individuals who came aboard, is that right? Isn't that right?

A. I think you are putting the question to me in a manner that would indicate that we are admitting that we did something or didn't do something. If I was to say I didn't know the names of the men who came aboard that ship to rope it off, that would be an indication of some liability and, since I didn't know it was roped off, I can't say I know a thing about it.

Q. How many men did you have working on that vessel?

A. That I can't answer. During the progress of the work, we would have as many as 10 and 20, though. Just how many on the ship I can't answer at this time.

Q. Have you seen your company records showing how long work was going on in that bunker hatch on August 6, 1944?

A. That can be gained from the records; yes. [274]

Q. Have you that record? A. No.

(Testimony of William A. Harrington)

Q. Could it be gotten from the records of the company?

A. I think it could; yes, sir.

Q. Isn't it true you could also get from the records of the company the names of the men who were working on that ship?

A. That is true.

Q. Did you go aboard that ship yourself before the work was started?

A. No.

Q. Did you go aboard the ship at any time while the work was in progress?

A. Yes.

Q. Did you go aboard the ship at any time before the work in the port bunker hatch was completed?

A. Yes.

Q. And was that after this accident had happened that you went aboard?

A. I couldn't answer that.

Q. Well, you found out about the accident on Monday following the accident, didn't you?

A. That is true.

Q. And did you go aboard the ship at that time?

A. No. [275]

Q. Did you go aboard the ship within a day or two after you found out?

A. I can't answer that.

Q. Well, what was the occasion upon which you went aboard while the work in the port bunker hatch was going on?

A. Merely in routine inspection of work around the yard.

(Testimony of William A. Harrington)

Q. What did you see with reference to the port bunker hatch on that day?

A. My inspection was down in the engine room, where a plate lapped over from the bunker hatch into the engine room, in which an additional item of work was involved.

Q. Did that work involve the port bunker hatch?

A. It did.

Q. That port bunker hatch was a fuel tank, wasn't it?

A. That is right.

Q. Will you produce the records, that are available to you, showing when the work was started on the port bunker hatch and when the work was finished on the port bunker hatch?

A. The records can be procured from the company; yes.

Q. And they are subject to your control, aren't they?

A. Not entirely; no.

Q. You are a ranking executive here in this office, aren't you?

A. The account department is handled by a separate vice [276] president.

Q. You can get them, can't you?

A. I can ask for them.

The Court: You can make a request upon counsel for them.

Mr. McHose: Your Honor, I would like to make a statement. I have been trying to get records, that might

(Testimony of William A. Harrington)

be records of some use in the trial of this case, for a long time—

A. We employ thousands of men down there.

Q. How many men did you have employed at that time?

A. During that period there was in the neighborhood of 8,000 men.

Q. And, when work is done in connection with a ship, some of the work is done in the shops on shore?

A. That is right.

Q. And timecards are kept of the men who do work in the shops on shore? A. Yes, sir.

Q. And other records are kept of the men who work on the ships, is that right?

A. That is right.

The Court: Has any request been made for those records?

Mr. McHose: No request has been made, but we have been unable to find any records of who did work on this particular bunker hatch.

Mr. Hon: If the superintendent of repairs has a memorandum [277] as to what he knows about it, if you will tell us what you want, he will make an effort tonight to get the records you want.

Mr. Gallagher: I want to find out when the work was started in the port bunker hatch and when it was finished. I want to know how many men were working on the ship making those repairs and who they were.

(Testimony of William A. Harrington)

Q. As I understand it, Mr. Harrington, you did keep time cards showing the name of each employee who worked aboard the ship?

A. Yes; they kept time cards of every employee who worked in the yard but whether they are detailed for each man working on a particular item is something I wouldn't swear to. For instance, you may start a man out in the morning on a bunker tank and then we would get a call from the Navy for assistance on a ship and there would be a transfer of men from that bunker tank to this other Navy ship. In that case, the records may be more or less upset and it might be, on account of that, Mr. McHose is having difficulty.

Q. Mr. Harrington, assume that, when this ship came into the yard of the Bethlehem Steel Company, the port bunker hatch was roped off and the cover was held at about a 45-degree angle by means of a stiff leg, and your men were going to perform work down in that bunker hatch consisting of installing the staging and doing lifting, they would open up the bunker hatch to permit [278] them to get down into the hold, wouldn't they?

A. Yes, sir.

Q. And, in order to get all of this material down, your workmen would have to open the bunker hatch and lay the cover back against the bulkhead immediately behind it, wouldn't they?

A. It has been done; yes.

(Testimony of William A. Harrington)

Q. Isn't that the usual custom?

A. Not always.

Q. But you knew it had been done?

A. It has been done; yes.

Mr. Gallagher: I will offer this picture in evidence, your Honor, for the purpose of illustration, as respondent Tide Water Associated Oil Company's Exhibit E.

Mr. Hon: Your Honor, I don't think I am going to object but I want to get one thing straight. That is one of the steps to illustrate what you intend to prove and connect up later as being the condition of the bunker hatch at the time the Bethlehem Steel Company took over?

Mr. McHose: I would like to ask a couple of questions.

The Court: I am willing to work as long as you men are. Do you want to go ahead?

Mr. McHose: I think, under the circumstances, I will ask Mr. Harrington to come back tomorrow and also ask that you find out whether you can get the records we asked for. I will [279] talk to you about that after court.

The Court: I think you had better try to find the records that have been requested here and then we can resume in the morning.

Mr. Gallagher: Here is what I would like to know, if it is possible to find it out, and that is who were the men

(Testimony of William A. Harrington)

who first went to work on that bunker hatch, so that we can get the names of the individuals who took off that roping and who laid it back against the bulkhead.

Mr. McHose: Mr. Gallagher, I object. There is no evidence in this case about that. I am also, Mr. Gallagher, going to object to the use—

The Court: We will consider admitting that photograph in evidence in the morning.

Mr. Gallagher: I will have at least four witnesses to testify to it. I am asking for their records of their employees.

The Court: If you ask for that record, I think you are entitled to have it, any of the employees who were on the premises in connection with this work, whatever it was.

Mr. McHose: I wanted it myself and I haven't been able to get it.

The Court: This picture may be marked for identification and then you may renew your offer later.

Mr. Gallagher: Will your Honor instruct the witness to [280] return?

The Court: Do you want to begin at 9:30 or 10:00?

Mr. Hon: I would rather begin at 10:00.

The Court: This matter may go over until tomorrow morning at 10:00 o'clock.

(Thereupon, a recess was taken until 10:00 o'clock a. m., Thursday, February 13, 1947.)

Los Angeles, California, February 13, 1947, 10:00 o'clock A. M.

(Same appearances.)

WILLIAM A. HARRINGTON,

the witness on the stand at the time of adjournment, being previously duly sworn, resumed the stand and testified further as follows:

Mr. Hon: Your Honor, I believe that we should introduce that blueprint into evidence so it will become part of the records.

The Court: Is there any objection?

Mr. Gallagher: No objection.

The Court: It may be received and marked as Libellant's Exhibit No. 2.

Mr. Hon: Mr. McHose, you agree on that offer, don't you?

Mr. McHose: Yes. I have no objection.

Cross Examination (Resumed)

Q. By Mr. Gallagher: Mr. Harrington, have you had an opportunity to examine the records of your company for the purpose of finding out when the work being done by the Bethlehem Steel Company in the port bunker tank was finished?

A. Those records are in the court room now.

Q. Will you produce that record, please?

Mr. McHose: May I suggest we might put Mr. Taylor on the stand? Mr. Harrington doesn't understand accounting. [282] your Honor.

Mr. Gallagher: I just want to ask Mr. Harrington a couple more questions on another line.

(Testimony of William A. Harrington)

Q. Mr. Harrington, when you testified that you sent the superintendent on board the Frank Drum to direct the work that was being done by the employees of Bethlehem, to whom were you referring?

A. I was referring to the superintendent of hulls and the superintendent of machinery.

The Court: Superintendent of what?

A. Superintendent of hulls and machinery.

Q. By Mr. Gallagher: Who was the superintendent of hulls? A. Mr. Courtiour.

Q. Would he have charge of the gang doing the work in the port bunker tank? A. He would.

Q. And was it his job to be on the ship while that work was being done?

A. His representatives and foremen would do so; yes. He, personally, during that time could not have possibly been on that particular job. It must be understood that we were in the middle of a war hysteria, in which ships were crowding into the yard and he had men under him to whom he delegated the work. Naturally, the custom of the company is— [283]

Q. I didn't ask you anything about the custom.

A. His duty—may I put it that way—is to make a routine inspection when it is possible.

Q. You have some information with reference to the names of the foremen on the job at that time, don't you?

A. I think Mr. Courtiour can give that; yes.

Mr. Gallagher: I think that is all, your Honor.

Mr. McHose: Are we going to finish with this witness before we put the other one on?

The Court: Have you some more questions?

(Testimony of William A. Harrington)

Mr. McHose: Yes. I wanted to clear up the matter that we raised last evening, when I asked Mr. Harrington questions concerning the responsibility for the vessel when it came into the yard and I made an offer of proof. I think the law is established, your Honor, that evidence of custom and usage, not to vary the terms of a written agreement but to explain the terms of a written agreement which is silent on a particular question, is admissible.

The Court: You refer to what in this case when you say "written agreement"?

Mr. McHose: The written contract between the Associated Oil Company and the Bethlehem Steel Company. That contract does not contain any provisions with respect to responsibility for the ship coming into the yard.

The Court: Let's see what contract you refer to.

Mr. McHose: We introduced it yesterday. [284]

The Court: Is this the sales order slip?

Mr. McHose: Respondent's Exhibit D.

The Court: Will you point out the contract that you have in mind?

Mr. McHose: This was the contract under which the work was done but it is supplemented, your Honor, by a well understood agreement between the parties, which is established by custom and usage in this port not only so far as the Bethlehem Steel Company is concerned but so far as all other shipyards are concerned. That custom and usage which I wish to prove by asking a question of Mr. Harrington is that the ships are always in charge of a master when they come into the shipyard or the shipyard doesn't accept responsibility for them. The master must always remain on board and is responsible to the

(Testimony of William A. Harrington)

owners. That is a custom that is commonly understood and is followed by all of the shipyards and is well known to the Associated Oil Company, the other party to this contract. And I have authorities here which state that testimony to that effect is admissible and, if your Honor still questions the point, I would like to refer to these authorities.

The Court: You directed your question and asked who was responsible and that word "responsible" means everything in this lawsuit in the way of a conclusion.

Mr. McHose: That is right; that first question was objected to and you sustained the objection and I did not press [285] the point but I asked another question, to which you sustained an objection and, to make my position clear this morning, I would like to re-ask that question.

The Court: Very well.

Redirect Examination

Q. By Mr. McHose: Mr. Harrington, is there an established custom and usage, not only with respect to Bethlehem Steel Company but also with respect to other shipyards in Los Angeles Harbor, in so far as the acceptance of responsibility and acceptance of possession and control of a ship which comes into your shipyard is concerned?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion and it is incompetent, irrelevant and immaterial. This is not an action on a contract. This is a tort action.

The Court: You are getting right back to where you started before. You are trying to establish, by custom,

(Testimony of William A. Harrington)

a legal responsibility without going into facts. You have a right to produce whatever facts there are in connection with what was done or is being done in cases of that kind, but, when you use the word "responsibility" and words of that character, that call for the judgment of the court—

Mr. Gallagher: May I suggest one further thing to your Honor? Suppose Mr. McHose were able to go all the way on this thing that he is advancing at this time and could produce [286] a written contract pursuant to which the Tide Water Associated Oil Company agreed to be responsible for all damage that might occur on the ship, whether it was the negligence on the part of the employees of the Bethlehem Steel Company or somebody in the employ of the ship owner or negligence on the part of anybody. Obviously, that kind of a contract wouldn't be admissible in evidence here in so far as this libellant is concerned, even—

The Court: Even if it were a written contract?

Mr. Gallagher: Even if it were a written contract.

The Court: I don't see why not. The written contract is competent to show what was being done and the relationship of the parties.

Mr. Gallagher: But what I am talking about is this. Suppose there happened to be an indemnity agreement in this contract. Suppose Bethlehem Steel Company agreed as part of the contract to indemnify Tide Water Associated against liability of loss or whatnot, and then this libellant brings a suit against Tide Water and he alleges that Tide Water is responsible for his injury. We couldn't introduce that contract in evidence in this case. The libellant is not a party to the contract. This is a case founding in tort and, while the relationship between

(Testimony of William A. Harrington)

Bethlehem and Tide Water is important only to the extent of showing what each was doing with the ship, it certainly has no other bearing on the case. [287]

The Court: Let me see the contract that you are alluding to now. Maybe there is something in there that I haven't noticed.

Mr. McHose: Mr. Gallagher has just made a statement of law which is not true. In the case of Porello v. United States, there was an agreement between the ship repair yard and the United States, which was operating the vessel, and the court permitted an indemnity agreement to be pleaded and held there was responsibility under that agreement. We are now in the realm of this case which has to do with responsibility between the Bethlehem Steel Company and the Tide Water Associated Oil Company.

The Court: Let me look at this for a moment.

Mr. Gallagher: Your Honor, I find nothing there that says anything about acceptance of responsibility for the ship.

Mr. McHose: My offer of proof is to prove what that custom is. Mr. Gallagher is making this situation difficult, although he knows and the Associated Oil Company knows, perfectly well, that, when that ship came into the yard, they had to maintain their own officers on board and had to be responsible for that ship. He is making it difficult. But at this stage I want to make an offer of proof to prove by this witness that a well-established custom and usage in this Harbor existed, although there is nothing said about it in this specific contract, but, under that, Associated Oil Company [288] knew and understood, when they brought that ship into the yard, they

(Testimony of William A. Harrington)

had to maintain someone in charge of it, and I think that is proper evidence.

The case of *Van Ness v. Pacard*, 7 Law Ed. 374, an early Supreme Court case decided by Justice Story, had to do with an agreement between landlord and tenant in respect to matters in which the parties were silent; nothing was said in the contract about it. And the judge said this "may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be cognizant of the custom, and to contract with a tacit reference to it." [289]

Section 1655 of the California Civil Code provides,

"Stipulations which are necessary to make a contract reasonable, or conformable to usage, are employed in respect to matters concerning which the contract manifests no contrary intention."

There are a number of cases under that section and under Section 1870 of the Code of Civil Procedure, which permits the testimony of usage or custom not to vary or contradict a written contract but to explain something in connection with the written contract which the contract itself is silent with respect to.

The Court: Here we have a written contract, an order for some work and an agreement to do the work. You are talking about something else. You are not throwing any light on the surrounding circumstances in relation to the repairs.

Mr. McHose: I see what your Honor is thinking. The only reason I am going into this at all is because

(Testimony of William A. Harrington)

Mr. Gallagher has in the position he has taken in this case attempted to say that the ship was brought into the Bethlehem yard and that the Associated Oil Company had nothing further to do with it.

The Court: Let's see if we can clarify the situation. I think you have already established the fact that this vessel came in with a stand-by crew. The rules are in evidence. That crew is there. I don't think you need any more evidence on [290] that score as to who was in charge of that vessel in so far as the rules are concerned and in so far as what actually took place is concerned. Now, we get down to the question of responsibility in this transaction. The theory of the owners of the vessel is that the shipyard was responsible and your theory is that the other people were responsible. Those matters all are to be established by questions of fact. Assuming that the vessel was in charge, as I think it was, of the crew, if your people did something that would be a negligent act, of course, we would have to determine then what responsibility was attached to it. I don't think you can establish by custom a responsibility.

Mr. McHose: We wouldn't be talking about this at all, your Honor, if Mr. Gallagher had not, in his pleadings and in his statements here in court and in his answers to the interrogatories which will be introduced later on, attempted to argue that he is in the position and Associated is in the position of you or me when we take our car into a garage and leave it with the garage keeper to repair it. Mr. Gallagher is saying that is an analogy to the situation here, which I want to satisfy your Honor is entirely different. The ship was never at any time in our possession and control and that is a well-established

(Testimony of William A. Harrington)

custom. I think the evidence to make that clear and support it in the case is admissible.

The Court: Assuming that you are correct in the matter, [291] nevertheless, if your workmen were negligent in doing anything they should have done in safeguarding the premises, the same as a contract, if they expose the work they are working on to hazards and dangers, you have a responsibility. This case will have to be decided on the facts of just what you did or failed to do, so as to establish negligence, if there is any to be established, and the same would apply to the owners of the vessel. The owners of the vessel bring that in with a skeleton or stand-by crew there. They claim, when they brought the vessel in there, the hatch was guarded with ropes or something of that kind. Now, if your employees took down those safeguards and permitted that to remain open and failed to replace them, or whatever the situation may be—I am not anticipating now—we will have to determine just what responsibility you have in the premises.

Mr. McHose: And that responsibility, your Honor, is dependent upon what responsibility we assumed for that ship.

The Court: If that crew was negligent in safeguarding those premises or any of them, if they failed to keep those premises safe, we will have to determine what their responsibility was but we would do that by testimony and not by a custom.

Mr. McHose: Then the proof is rejected, is it, your Honor, my offer of proof?

The Court: You may go ahead and prove the facts but, when [292] you use the word "responsibility,"—

(Testimony of William A. Harrington)

Mr. McHose: May we have a ruling on my specific question just for the purpose of the record?

The Court: Let me read this in here again. Was it intended that this fine print should be read by the contracting parties or was it there, just as these clauses are put in some of these conditional sales contracts, to make it almost impossible for anyone to read such fine print?

Mr. McHose: That fine print doesn't add anything to this case, your Honor.

The Court: I think it does. Have you read it?

Mr. McHose: We agree to be responsible for our own negligence if any damage was done to the Associated Oil Company's ship. We would be responsible for that even without the fine print in this agreement, and I don't think it adds anything so far as this case is concerned.

The Court: What do you think this word "accidents" means in that fine print?

Mr. McHose: I think you have to read the entire clause. We agreed and certainly do agree that we are responsible for our own negligence.

The Court: You say you will not be responsible for delays, delays caused by strikes, accidents, delay of carriers and other delays. Now, that word "accidents" means some kind of accidents. [293]

Mr. McHose: Yes, but only in case it results from our own negligence. There is one clause in that first letter of agreement, your Honor, that I might ask Mr. Harrington a question about, which might help you.

Q. Mr. Harrington, in this letter agreement, there is a paragraph, on the second page, which says you will, first, furnish fire watch in compliance with the regulations

(Testimony of William A. Harrington)

of captain-of-the-port. Will you tell me what that means, in the past?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness.

The Court: I think that is susceptible of explanation. I don't know what a fire watch is. Overruled.

A. Your Honor, the regulations of the port for repairing vessels in the defensive sea area carry that requirement, but it is a new requirement that has been invoked into the business, and it is an expense to which the operators were not to be put under normal peace-time conditions. It meant extra labor on the part of the fire watch to be placed underneath the deck where welding is being done on the deck, a fire watch on each side of a bulkhead where welding was being performed on the bulkheads.

The Court: What is a fire watch?

A. A fire watch is a man who stands by with an extinguisher to put out sparks or report a fire if a fire [294] breaks out.

The Court: That has to do with safeguarding the boat from danger by fire during the work that is being done, is that right? A. That is right, your Honor.

Q. By Mr. McHose: And, under the contract, you provided a fire watch?

A. We provided a fire watch.

The Court: That does go to the meat of the proposition that you offered. Let's have your question again and I will give you a ruling on it.

(Question read by reporter.)

The Court: I suppose you have had time, Mr. Gallagher, between yesterday evening and this morning to

(Testimony of William A. Harrington)

bring in some authorities on this question of custom and usage, that you objected to?

Mr. Gallagher: I understood your Honor ruled on that yesterday. So I didn't bring any cases on it. I know I haven't been able to get any on custom and usage in a tort action. If you have an accident on a dock and a man is run over by a lumber carrier, one of these straddling affairs,— I have introduced evidence of custom and practice in that case. I represented the plaintiff in that kind of litigation but that was for the purpose of showing that the plaintiff was not guilty of contributory negligence in failing to keep [295] a constant lookout behind him for these carriers, and the evidence went to custom and usage that they always blew a horn before they started those things. But I can't see where custom and usage is of any materiality in this case at all because neither one of us claim that the libelant was relying on any custom or usage. He doesn't claim that he was and he wasn't a contract party. So I think that the entire case depends on plain, ordinary principles of tort litigation.

Mr. McHose: The whole question involved is one of responsibility, assuming the court should find the libelant is entitled to recover. Then the question for the court's decision will be is Tide Water Associated responsible or is Bethlehem responsible, and the question of the basis on which that ship was in the yard is highly important in the determination of that question.

Mr. Gallagher: The court might determine that both respondents are responsible or that neither respondent is responsible.

Mr. McHose: Quite true. If you had not raised the suggestion and inference that you have no responsibility

(Testimony of William A. Harrington)

for the ship after you brought it into our yard, I wouldn't be wasting time with this line of questioning because I think it is wholly immaterial. But you have raised that defense.

Mr. Gallagher: I have taken the position, your Honor, [296] and I think it is clear, that, when the vessel came into the shipyard, the port bunker hatch was secured. It had ropes around it and it was in about a 45-degree angle, and that the workmen employed by the Bethlehem Steel Company came aboard and, while they didn't assume total possession of the vessel, they certainly took over that part of the vessel where they were doing work; and, when they got through with it, it is our position they should have put it back in the position in which they found it, if they were going to come back to do some work; and, if they were all through with their work, they should have put it back in its previous condition; and that, if all facilities were under the control of Bethlehem, and, if anyone was required to light that part of the ship, they should have done it. And, as a matter of fact, they did come back and light it up.

Mr. McHose: You are making misstatements of fact.

Mr. Gallagher: No; I am not.

The Court: This is not the time to argue the case. Let's have that question.

(Question read by reporter.)

The Court: Responsibility for what?

Mr. McHose: Responsibility for the possession and control of the ship.

The Court: Responsibility for accidents or what?

(Testimony of William A. Harrington)

Mr. McHose: Well, I don't think the question need to go [297] to that extent. For instance, I own a piece of property and I take that property in to Mr. Gallagher and he is going to do some work on that property. He becomes responsible for it. But, if it is a ship and I maintain my captain on board, I am responsible for it.

The Court: You have to confine yourself to the one issue here.

Mr. McHose: Let's make it read this way, then, whether there is a custom or usage to take the possession and control of the ship which comes into the yard.

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion of the witness and is incompetent, irrelevant and immaterial.

The Court: That objection will be sustained.

Mr. McHose: I would like to make an offer of proof, your Honor. Is it necessary to make a statement or may we have an understanding I am making an offer of proof of that fact?

Mr. Gallagher: I am willing to stipulate counsel offers to get an affirmative answer of the witness to that question.

Mr. McHose: I am making an offer of proof of custom and usage in the repair business in this Harbor, that no shipyard takes possession and control of any ship which comes into this yard; that the possession and control at all times remains under the owner of the ship. And this custom and [298] usage, in my opinion, has

(Testimony of William A. Harrington)

the binding force of a contract between the Associated Oil Company and Bethlehem.

The Court: If you have an authority to that effect, I will listen to you but that authority I don't think is applicable that you just read.

Mr. McHose: I have no authority of a ship. There is no such case. But I cited the case of *Van Ness v. Pacard*, 7 U. S. 137, which is the landlord and tenant case to which I referred.

The Court: I don't think that will help us.

Mr. McHose: Also *United States Daily Publishing Corporation v. Nichols*, 32 Fed. (2d) 834, where evidence was permitted as to custom. I also referred to *Hanley v. Marsh & McLennan*, 46 Cal. App. (2d) 787, and a number of California cases cited in Witkin under "Contracts," Section 229.

The Court: We have Witkin in here. Let's find that right now.

Mr. McHose: I am sorry to be taking time with this because I don't feel it is important, but I feel the position in which Mr. Gallagher has placed me compels me to protect my client's position.

The Court: There is a rule that, while custom cannot excuse a negligent act, evidence of custom and usage has been admitted for the purpose of showing what constitutes negligence. But you are presupposing here—

Mr. McHose: I am not offering this evidence in any sense [299] as proving or disproving negligence. I am

(Testimony of William A. Harrington)

only offering it to show responsibility of the Bethlehem Steel Company shipyard at the time when that ship came into the yard.

The Court: Is it in the new work of Witkin?

Mr. McHose: The new one, Volume 1, "Contracts," Section 229.

The Court: There is a statement here, "But usage can only be invoked to interpret and not to create contractual terms."

Mr. McHose: I haven't the slightest intention of doing that.

The Court: What part of this contract do you wish to interpret?

Mr. McHose: There is no direct statement in that contract, your Honor. If the real contract between these parties had been written out in detail, Bethlehem would have put a provision in that contract, which would be substantially in this language, "It is understood and agreed that Bethlehem Steel Company does not take possession and control of any ship which comes into our yard if the possession and control of that ship at all times remains in Tide Water Associated Oil Company and in the master of the ship." There is no such provision specifically in that contract but that is well known and well understood by Mr. Gallagher's Tide Water Associated Oil Company. [299a]

The Court: You will have to prove that. That is a fact in this case. That vessel was brought in and was

(Testimony of William A. Harrington)

in charge of the crew apparently but that has nothing to do with the negligence of either party.

Mr. McHose: I think it does, your Honor. You must keep in mind an important fact in this case, that our men left the ship at 3:00 o'clock on Saturday afternoon. We had nobody on that ship all day Sunday. The accident occurred at 9:30 on Sunday night. During all of that time that ship was in possession and control of Tide Water Associated Oil Company. If your Honor should find that we should have left that hatch in some other condition than we did, my position is that your Honor then must find that the Tide Water Associated Oil Company, having had charge of the ship all day Sunday, should have corrected any condition that existed.

The Court: Both of you might have been negligent. If your employees failed to leave the ship in the condition in which they found it, that it is to say, with that safeguard replaced, there is a probability that your employees were negligent and that the employees of the owners of the ship, having observed that place open and having left it open, may have been negligent. I think those are the possibilities in this case notwithstanding the responsibility of the owners of the vessel and the general responsibility of the shipyard for the action. [299b]

Mr. McHose: I quite agree with your Honor. I think your analysis is exactly correct. One reason I am in this subject at all is because of the position Mr. Gal-

(Testimony of William A. Harrington)

lagher has attempted to take when he says, "We had nothing to do with the ship; we had no responsibility for it; we turned it over to you and have nothing further to do." That is the thing we want to justify. I think your Honor is satisfied in your own mind that is the case. I don't know what evidence Mr. Gallagher is going to introduce.

The Court: I will have to deny your offer. It is too broad and general and I don't think it meets the issues. [299c]

Mr. McHose: All right, your Honor. I will ask one or two other questions.

Q. Mr. Harrington, did you provide any watchmen for that ship while it was in the yard, other than the fire watch?

A. No. It was our custom to provide watchmen at the gangway when aboard the ship.

Mr. Gallagher: I move to strike out all of the answer excepting "No" upon the ground that the balance of it is not responsive and also states conclusions and is a voluntary statement of the witness.

The Court: The latter part of the answer may go out.

Mr. McHose: That may go out. That is all, Mr. Harrington.

Mr. Gallagher: That is all.

Mr. McHose: Mr. Taylor, will you take the stand.

JAMES E. TAYLOR,

a witness for the respondent Bethlehem Steel Company, being first duly sworn, testified as follows:

Mr. McHose: May Mr. Harrington be excused, your Honor?

The Court: Yes.

Mr. McHose: I am just wondering if perhaps we ought not to go back. I didn't think for a moment that you really had not completed your case.

Mr. Hon: Go ahead. I don't care. [300]

Mr. McHose: We also want to call Mr. Richardson to clear up that one point that was hanging yesterday.

The Clerk: Will you please state your name?

A. James E. Taylor.

Direct Examination

Mr. McHose: I want to make a statement before I turn Mr. Taylor over to Mr. Gallagher. I think Mr. Gallagher has put us in a very difficult position by the demand which he made yesterday, in the middle of this trial, to produce records which are voluminous and complicated. As I stated yesterday, I tried to find out the names of the men who might have been working in this bunker hatch on the day the accident happened, and I was unsuccessful in doing so, and Mr. Taylor's testimony will explain why. Mr. Gallagher knew, by my answers to interrogatories in this case, filed some weeks ago, that I did not have any detailed evidence on this and, yet, yesterday afternoon, he made this demand, which necessitated our men working late last night trying to get the information together. Mr. Taylor has brought up with him his records and you can ask him anything you want.

Cross Examination

Q. By Mr. Gallagher: Mr. Taylor, do you have records showing the names of the foremen or heads of gangs that worked on the Frank G. Drum at the time the first work in the port bunker hatch was done? [301]

A. I have records of the names of heads of gangs.

Q. Do you have any records at all showing where these various gangs were working on the ship?

A. No, sir.

Q. How many foremen did you have working on the ship on that day, when the work in the port bunker hatch was commenced?

A. A foreman as such is not charged—

Q. I didn't ask you whether he is charged with anything. I asked you how many you had there.

A. I can't answer that question.

Q. Your records don't show that?

A. No, sir.

Q. Who had general supervision and charge of that work being done in the port bunker hatch on the Frank G. Drum?

A. I am not in a position to answer that question.

Q. Did you have any superintendents?

A. We had superintendents; not under my jurisdiction.

Q. What is your jurisdiction?

A. My jurisdiction is the time spent, among other things.

Q. In other words, you are in the accounting divisions?

A. That is correct.

(Testimony of James E. Taylor)

Q. And you wouldn't know from looking at the records [302] who the superintendent was or who the foremen were that were on that ship?

A. That is correct.

Q. Who would know that in your company?

A. Mr. Harrington could testify to that.

Mr. Gallagher: That is all.

The Court: Is there anything further?

Mr. McHose: Yes; I think I will ask a few questions.

Redirect Examination

Q. By Mr. McHose: Mr. Taylor, do you have under your jurisdiction time records, which come in to your office, that show time spent on various jobs in the shipyard? A. I do.

Q. In August, 1944, were you engaged in a large number of jobs? A. We were.

Q. And about how many men did you have in your employ then?

A. We had at that time 4600 men or 4700.

Q. Do you maintain records which show a particular job, such as work on the Frank G. Drum, which show the time that is devoted to that job? A. I do.

Q. Will you tell the court just in as few words as you can how you keep those records and what they show? [303]

The Court: I think all of this should have been done before this trial. We are taking up a lot of time in your attempt to discover evidence which you have had ample opportunity to discover some time ago, before this case

(Testimony of James E. Taylor)

ever came to trial. As long as we have started on it, you may continue but let's not drag this out too much.

Mr. McHose: Your Honor, I am willing to conclude it with just a simple statement that Mr. Taylor will testify that his records, for example, on the 5th of August, show 165 men who did work on item No. 1 on a particular job, which was the Frank G. Drum, and that that meant that there were 165 men who might have gone down in the bunker hatch of that ship. Some of them did work in the tool and machine shops on shore and some of them did work on the ship.

Q. Of the 165 men, about how many might still be in your employ? A. Probably 10 per cent.

Mr. McHose: And, also, we do not have accurate addresses of the others to trace them down. That is the reason why, a year after the accident happened, we are not in a position to give the names of the men.

The Court: As I understand it, you have no record available to show exactly who did the work and when it was done on this particular job?

A. I have that record; yes, sir. [304]

The Court: You have that record of the men?

A. Yes, sir.

The Court: But there are approximately 165 who participated in that work, is that correct?

A. Who spent all or part of their days on that.

The Court: On this particular item of work?

A. Yes, sir.

The Court: Do you have a record of the gang leaders? A. Yes, sir.

(Testimony of James E. Taylor)

The Court: How many of those?

A. I don't know offhand. I could find out.

The Court: Approximately?

A. About one for each 10 men.

The Court: How many of those are in your employ, again? 10 per cent?

Mr. McHose: The superintendent will discuss that, your Honor.

The Court: Yes. Is there anything further?

Mr. McHose: That is all.

Mr. Gallagher: Nothing, your Honor.

Mr. McHose: May Mr. Taylor be excused and be permitted to take his records back with him?

The Court: That is up to Mr. Gallagher. Do you want to inspect the records?

Mr. Gallagher: No, your Honor. I thought they would [305] have some records showing the names of these men but Mr. McHose says the superintendent will clear that up. So we will get it from him.

Mr. McHose: The superintendent doesn't have the names of the men.

The Court: You don't want these records, is that correct?

Mr. Gallagher: No; that is correct.

The Court: You may be excused and take your records.

Mr. McHose: We would like to call Mr. Richardson again.

Mr. Hon: Are you calling him as your witness?

Mr. Gallagher: No; for cross examination.

Mr. McHose: No.

DAVID LAWTON RICHARDSON,

the libelant, being previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. By Mr. Gallagher: Mr. Richardson, at the time you stepped out onto the deck, you had let the curtain close behind you, hadn't you?

A. When I brought my right foot out, the curtain closed behind me as I brought it out.

Q. So that, since the curtain closed behind you, everything was dark out there on the surface of the deck?

A. As soon as it closed behind me; yes, sir. [306]

Q. And right then you were blinded to a certain extent, weren't you? A. Right then; yes, sir.

Q. In other words, you testify now the same as you did in your deposition, on page 20, "Q. And when you stepped through the door you saw that it was dark out there, didn't you? There were no lights out there?

"A. I stepped out and I was kind of light blinded."? You remember that, don't you? A. Yes.

Q. And that was correct, was it?

A. That was correct.

Q. You recognized, since you got on that ship, the fact that it was a different type than you had ever been on before, didn't you?

The Court: Will you take your place back there?

Mr. Gallagher: I just wanted to show him this testimony on page 40, line 13 to line 18.

Q. Will you read that?

The Court: What did you want to ask? Do you want to ask him if he testified to that?

(Testimony of David L. Richardson)

Mr. Gallagher: Yes; I want to refresh his recollection to save time.

Mr. Hon: I will stipulate he answered it.

Mr. Gallagher: "Q. Well, when you got on that parti- [307] cular tanker that night it appeared to you that it was a different type ship than anything you had ever been on in your life; is that right?

A. It appeared to be a different type than I was used to."

Mr. Hon: Yes; he testified to that. There is no question about that.

Q. By Mr. Gallagher: Mr. Richardson, did you see any lights of any kind on the deck of the ship that night excepting at the head of the gangway, when you came up? A. Only in the passageway.

Q. That wasn't on the outside deck? That was inside where it was covered, wasn't it? A. Yes, sir.

Q. And those were bright lights in the passageway, weren't they? A. Yes, sir.

Q. When you stepped out of the exit from the port passageway, there were no lights in the vicinity of that door and no illumination of any kind after the curtain closed behind you, isn't that correct?

Mr. Hon: That has been asked and answered.

The Court: He said it was dark, didn't he? Wouldn't that exclude any theory of light?

Mr. Gallagher: I guess it would. That is all I wanted [308] to establish. If that is conceded—

The Court: Is that true,— A. Yes, sir.

The Court: —that it became dark—

A. When I brought my right foot out, that is when I fell.

(Testimony of David L. Richardson)

The Court: You let the curtain close behind you and it was dark? A. Yes.

Q. By Mr. McHose: You never did see the hatch into which you fell, did you?

A. No, sir; I never did see it.

Mr. McHose: That is all.

Mr. Hon: Shall I proceed with my case?

Mr. Gallagher: You may go ahead.

Mr. Hon: Or you may proceed. I can read my interrogatories at any time.

Mr. Gallagher: I think libelant might as well finish.

Mr. Hon: Okay. May it please the court, at this time we wish to read, first, answers to certain interrogatories, special interrogatories, which were prepared and filed and served on the respondent Bethlehem Steel Company, a corporation, under date of approximately November 7, 1946.

Mr. Gallagher: Before you do that, Mr. Hon, I assume it is understood that answers returned by the respondent Tide [309] Water Associated Oil Company are not binding on Bethlehem Steel Company and answers made by Bethlehem are not binding on Tide Water?

Mr. Hon: I would assume that would be true. Now, is it all right if I let Mr. Feintech read the answers and I will read the questions?

The Court: Yes.

Mr. Hon: Do you want him to take the stand and read the answers, your Honor? I will read the questions and Mr. Feintech will read the answers.

Mr. Feintech: Do you want me to be sworn, your Honor?

The Court: No; you are just reading something.

(Testimony of David L. Richardson)

Mr. Hon: These are the questions and these are the answers of the Bethlehem Steel Company, a corporation.

“Interrogatory No. 1—” As a preamble to these interrogatories, I will state as follows: “Special interrogatories addressed to respondent Bethlehem Steel Company: As used in the questions that follow, “stand-by crew” refers to those members of the ship’s company of the S. S. Frank G. Drum who had duties to perform in behalf of the ship while she was in a repair status at the repair docks of the Bethlehem Steel Company, and/or who were living aboard the vessel at that time. ‘Repair crew’ refers to those employees of the Bethlehem Steel Company who were engaged in repairing the S. S. Frank G. Drum while she was in a repair status.” [310]

The Court: Let me suggest this. Do you wish to introduce those interrogatories and the answers?

Mr. Hon: Not all of them. I only am offering those—

The Court: They are in the record? They are filed?

Mr. Hon: Yes; they are filed in the record, your Honor. I will save the court’s time by stating this, that I wish to introduce—those that have no bearing on the libellant’s case, naturally, I wouldn’t introduce. I understand I am permitted to introduce those I care to introduce.

The Court: You asked the questions?

Mr. Hon: Yes, sir.

The Court: And we have all of the answers?

Mr. Hon: Yes, sir.

The Court: And you wish to use only a part of those answers?

Mr. Hon: I don’t mind using all of them.

(Testimony of David L. Richardson)

The Court: Why not let the questions and answers be considered as having been read?

Mr. Hon: I am in a dilemma to know the proper procedure in that respect, to be frank with you, and the record may so show, whether or not, properly, I should read them into the record or just let that be a part of the record. I don't know.

The Court: Is there any objection to the questions and answers, in so far as both respondents are concerned, being [311] considered as having been read into the record?

Mr. Gallagher: No objection.

Mr. McHose: No objection.

Mr. Hon: The particular ones I will call attention to, on which I will lay stress—

Mr. McHose: Isn't that a matter of argument?

Mr. Hon: For the purpose of the record, as far as Bethlehem Steel is concerned, they will be Special Interrogatories 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

The Court: Do you want to show who those interrogatories were propounded to?

Mr. Hon: To the corporation in and of itself.

(The special interrogatories and answers referred to are as follows:

Interrogatory No. 1. Had a repair crew or any other employees of the Bethlehem Steel Company worked on the S. S. Frank G. Drum on August 6, 1944? If not, when was the last time such persons had worked on the vessel?

Answer No. 1. No. August 5, 1944, about 3:00 p. m.

Interrogatory No. 2. What is the name and last known address of the man in charge of the repair crew on the S. S. Frank G. Drum on August 6, 1944, or the last repair crew to work on the ship, if no repair crew was working on August 6, 1944? [312]

Answer No. 2. Various types of work were in progress, such as welding, riveting, pipefitting, shipfitting, etc. Different men were in charge of each group of repair men.

Interrogatory No. 6. How many men were there in the last repair crew on board the S. S. Frank G. Drum prior to 2100 on August 6, 1944?

Answer No. 6. It is impossible to answer this question. Time records show that approximately 192 men were employed in connection with the repairs being made on August 5, 1944. Some of these men were engaged in work in the shop; others on board the ship. We do not know and cannot determine the exact number on board.

Interrogatory No. 7. Was the nature of the repairs being made on the S. S. Frank G. Drum at the time this accident occurred such that the bunker hatch into which Richardson fell had to be uncovered while the repair crew was actually at work?

Answer No. 7. Yes. The only means of ingress and egress and ventilation to the bunker tank in which plate work was being done.

Interrogatory No. 8. If the answer to the preceding question is "Yes," was there any reason why the bunker hatch could not have been covered or roped off and lighted

or otherwise guarded at the end of the last working day immediately preceding the accident in question?

Answer No. 8. This would be a matter within the control [313] of the Frank G. Drum.

Interrogatory No. 9. Were the members of the repair crew instructed to cover any hatches at the end of the working day, or, if it was decided by the foreman or some other responsible person that a hatch should be left uncovered, what was the repair crew instructed to do to warn others of this condition?

Answer No. 9. No. This also is in the control of the ship.

Interrogatory No. 10. At the time this accident occurred, was there a fixed time of day at which all hatches not being worked in were to be secured?

Answer No. 10. Not to our knowledge.

Interrogatory No. 11. Why was the hatch into which Richardson fell left uncovered on the evening of August 6, 1944?

Answer No. 11. Do not know, as this was within the ship's control. However, it is our understanding it is quite customary to leave hatches uncovered for ventilation or other reasons.

Interrogatory No. 12. Why was the hatch into which Richardson fell unlighted on the evening of August 6, 1944?

Answer No. 12. Do not know, as this was within the ship's control. However, we do not believe it is customary to light the decks of tankers at night. [314]

Interrogatory No. 13. Why was the hatch into which Richardson fell unguarded on the evening of August 6, 1944?

Answer No. 13. Do not know, as this was within the ship's control. However, we do not understand that it is customary to provide guards for such purposes.

Interrogatory No. 14. It has been stipulated that the Bethlehem Steel Company provided electric power for the ship while it was in a repair status. Did the Bethlehem Steel Company have the right to turn on any of the ship's lights that lighted the deck while the vessel was in a repair status?

Answer No. 14. No. Electric power was furnished for ship's use as requested by ship's officers.

Interrogatory No. 15. Did the Bethlehem Steel Company have the right to install and turn on portable or temporary lights to illuminate the deck of the S. S. Frank G. Drum?

Answer No. 15. Yes, but only when and where necessary to proceed with repair work.

Interrogatory No. 16. Did the Bethlehem Steel Company have any extension lights or other suitable lighting equipment that could have been used to light the deck of the S. S. Frank G. Drum on the evening of August 6, 1944?

Answer No. 16. Yes, if required by ship's officers.

Interrogatory No. 17. If the answer to the preceding question is "Yes," would such equipment have been furnished to the S. S. Frank G. Drum upon the request of a proper member of [315] the ship's crew?

Answer No. 17. Yes.

Interrogatory No. 18. Was it the duty of the civilian guards at the entrance to the Bethlehem Yards to keep any unauthorized persons out of the yards?

Answer No. 18. Yes.

Interrogatory No. 19. Was it the duty of Bethlehem's civilian guard to keep any trespassers or other unauthorized persons from boarding the S. S. Frank G. Drum?

Answer No. 19. No. Bethlehem maintained no civilian guard at the ship.

Interrogatory No. 20. If the answer to the preceding question is "Yes," were such guards instructed that Coast Guardsmen with a rating of less than petty officer were not to board any vessel in the repair yard for purposes of inspection unless accompanied by such officer?

Answer No. 20. Do not know.

Interrogatory No. 21. At the time this accident occurred, did the Bethlehem Steel Company know that the Coast Guard would inspect ships tied up at the repair docks?

Answer No. 21. Yes.

Interrogatory No. 22. Did the Bethlehem Steel Company know that in making such inspections, the Coast Guardsmen had the right to inspect the entire vessel from stem to stern?

Answer No. 22. Do not know what right of inspection [316] Coast Guardsmen might have.)

Mr. Hon: In so far as the special interrogatories addressed to the Tide Water Associated Oil Company are concerned, the court's attention will be particularly called to Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 11, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 29, 30, 31, 32 and 33, and the answers thereto.

The Court: It all goes in as part of the record?

Mr. Hon: Yes, your Honor.

(The special interrogatories and the answers referred to are as follows:

Interrogatory No. 1. Were the members of the standby crew employes of and paid by the Tide Water Associated Oil Company?

Answer No. 1. The members of the crew aboard the vessel were there merely as a security watch. These members of the crew were paid by Tide Water Associated Oil Company, a corporation.

Interrogatory No. 2. What is the name, rank or rating at the time of the accident, and last known address of each member of the standby crew?

Answer No. 2. The name, last known address, rank and rating of the members of the security watch aboard at the time of the accident are: Asa H. Humble, 3rd Mate, 3660—47th [317] St., San Diego, California; J. J. Schleef, Chief Engineer, 1275 — 12th Avenue, San Francisco, California; B. Bisnagno, Bos'n, Fort Jones, California.

Interrogatory No. 3. Which of the persons mentioned in question 2 were actually on duty aboard the SS Frank G. Drum at 2100 on August 6, 1944?

Answer No. 3. See answer to number 2.

Interrogatory No. 4. Who was the Captain of the SS Frank G. Drum on August 6, 1944, and what is his last known address?

Answer No. 4. O. Bengston, 1940 Anza Street, San Francisco, California.

Interrogatory No. 5. Who was in command of the SS Frank G. Drum on August 6, 1944?

Answer No. 5. The vessel was withdrawn from navigation.

Interrogatory No. 6. What were the duties of each individual member of the standby crew while the SS Frank G. Drum was at the Bethlehem Steel Company's repair yards?

Answer No. 6. To act as security watch.

Interrogatory No. 7. Were any members of the standby crew to inspect the ship for any reason while it was in a repair status?

Answer No. 7. The vessel had been delivered to the Bethlehem Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same. [318]

Interrogatory No. 8. If the answer to the preceding question is "No," then, who was to inspect the vessel for fire hazards, leaks, sabotage, etc.?

Answer No. 8. There were no fire hazards aboard the vessel. All machinery was shut down. The hull was in good condition.

Interrogatory No. 11. Was the nature of the repairs being made on the SS Frank G. Drum such that the bunker hatch into which Richardson fell had to be uncovered on the evening of August 6, 1944?

Answer No. 11. Employees of the shipyard are the only ones who can tell the nature of repairs or why the bunker hatch was uncovered.

Interrogatory No. 13. Why was the bunker hatch into which Richardson fell open and uncovered at 2100 on August 6, 1944?

Answer No. 13. This question can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of this respondent.

Interrogatory No. 17. Was it customary for the ship's crew to leave a bunker hatch uncovered, unlighted, unguarded, and not roped off at night?

Answer No. 17. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the bunker hatch while the vessel was in the shipyard for inspection and [319] repair.

Interrogatory No. 18. Were there any fixed lights on the SS Frank G. Drum that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell?

Answer No. 18. No.

Interrogatory No. 19. Did the ship have any portable lights that could have been used for this purpose?

Answer No. 19. No.

Interrogatory No. 20. If the answer to the preceding question is "No," were such lights available at the Bethlehem Steel Company's repair yards?

Answer No. 20. This respondent does not know.

Interrogatory No. 21. Where were the members of the standby crew at the time the accident in question occurred?

Answer No. 21. Chief Engineer Schleef was standing on the starboard side of the poop deck. Bos'n Bisango was in the same place. Asa H. Humble, 3rd Mate, was in his quarters.

Interrogatory No. 22. Was there any requirement or regulation in effect on August 6, 1944, that some member

of the ship's crew should be stationed at or near the gang plank at all times?

Answer No. 22. Not that this respondent know of.

Interrogatory No. 23. Was there a member of the ship's crew stationed at or near the gangplank at 2105 on August 6, 1944? [320]

Answer No. 23. No; excepting the two who were on the poop deck.

Interrogatory No. 24. Did the Tide Water Associated Oil Company know that the SS Frank G. Drum would be inspected by the United States Coast Guard while she was tied up at the repair docks?

Answer No. 24. The Tide Water Associated Oil Company knew that the statutes of the United States permitted certain designated persons in the Coast Guard to board the vessel any time such persons were ordered to do so by proper authorities but has no information with reference to when such persons would board the vessel.

Interrogatory No. 25. If the answer to the preceding question is "Yes," did the Tidewater Associated Oil Company know that in making such inspections the Coast Guardsmen making the inspection could inspect the entire ship from stem to stern?

Answer No. 25. Tide Water Associated Oil Company had no power to restrain the Coast Guard from doing anything it undertook but would naturally expect any person to use the usual and ordinary means furnished for moving from one part of the vessel to another.

Interrogatory No. 26. Had the members of the stand-by crew been told that the United States Coast Guard might inspect the SS Frank G. Drum while it was tied up at the repair [321] docks?

Answer No. 26. No member of the security watch has so stated; therefore this respondent does not know.

Interrogatory No. 27. Had the SS Frank G. Drum ever been inspected by any members of the United States Coast Guard during the war prior to this accident?

Answer No. 27. Respondent assumes so but has no actual knowledge thereof.

Interrogatory No. 28. If the answer to the preceding question is "Yes," had these inspections always been made by a Coast Guardsman of at least petty officer rating or by a detail under the immediate command of a Coast Guardsman of such rating?

Answer No. 28. Respondent does not know.

Interrogatory No. 29. Had the members of the ship's crew ever been told that a Coast Guardsman with a rating lower than petty officer was not authorized to board the vessel alone?

Answer No. 29. Respondent does not know.

Interrogatory No. 30. Did the Tide Water Associated Oil Company ever challenge the right of a Coast Guardsman of less than petty officer rating to board the SS Frank G. Drum?

Answer No. 30. Respondent does not know what employees of this respondent may have done.

Interrogatory No. 31. Did the Tide Water Associated Oil [322] Company ever take any steps to keep Coast Guardsmen of less than petty officer rating off the SS Frank G. Drum?

Answer No. 31. Respondent does not know what any employees of respondent may have done in this respect.

Interrogatory No. 32. Did the Tide Water Associated Oil Company ever protest to the Coast Guard authorities about Coast Guardsmen of less than petty officer rating boarding the SS Frank G. Drum unaccompanied by commissioned or petty officers? If so, please give the details.

Answer No. 32. No.

Interrogatory No. 33. Did a member of the ship's crew make a report of this accident to the Tide Water Associated Oil Company? If so, who?

Answer No. 33. The Master.)

Mr. Hon: It is 11:00 o'clock. Could we have our recess now? I think we are going to rest.

The Court: We will take a recess for 10 minutes.

(Short recess.)

Mr. Hon: Your Honor, with reference to the amendment to the libel, in so far as the fictitious names are concerned, we would like permission to cure that by amending the libel by adding Article Second A. "That at all times herein mentioned John One, John Five and John Six were the agents, servants and/or employees of the respondents, Bethlehem Steel [323] Company, a corporation, and/or Tide Water Associated Oil Company, a corporation, and at all times herein mentioned were acting within the course and scope of their employment and/or agency; that the true names of John One, John Five and John Six are unknown to libelant, and, when he ascertain their true names, he will ask leave of court to amend this libel by inserting their true names at this place."

The Court: Are you attempting to amend to conform to this?

Mr. Hon: At the beginning of the trial when I dismissed as to the Does, you stated I might amend my libel, so that was the purpose of putting that amendment in. It was at your suggestion. I think that the libel was passed upon as being technically correct. At one time there was a demurrer filed and that has been passed upon

by the court and I simply do that because you wanted me to dismiss as to the fictitious parties.

The Court: There is no objection to setting out fictitious servants and agents but, of course, eventually, you would have to connect them up some way, wouldn't you?

Mr. Hon: Eventually, if I ascertain their names during this trial, I would insert the true names.

The Court: It wouldn't do any harm. Is there any objection?

Mr. McHose: The way I understood it, he said these par- [324] ties were employees of both respondents. Did I misunderstand it?

Mr. Hon: Of both respondents; yes.

Mr. McHose: How could somebody be employed by Mr. Gallagher's client and also ours?

Mr. Hon: I put "and/or" in there.

Mr. McHose: We are not making any opposition as far as we are concerned. If there is proof as to some of our employees, we are responsible.

Mr. Hon: Anyhow, the corporation should be responsible without bringing in the employees who did the work. It would be a question of respondeat superior, your Honor.

The Court: There is no objection to the amendment as proposed but write it out and place it in the files.

Mr. Gallagher: May it be deemed denied?

The Court: It may be deemed denied. Is that correct?

Mr. Hon: Oh, yes. The libelant rests.

Mr. McHose: Does your Honor have any particular preference as to how the respondent's testimony should be put on?

The Court: I have no preference as to whichever way you gentlemen determine you would like to put in your defense.

Mr. McHose: Mr. Gallagher suggests we were named first in the libel and perhaps should put it on first. Will you take the stand, Mr. Courtiour? [325]

WILLIAM J. COURTIOUR,

a witness on behalf of the respondent Bethlehem Steel Company, being first duly sworn, testified as follows:

The Clerk: How do you spell your name?

A. C-o-u-r-t-i-o-u-r.

Direct Examination

Q. By Mr. McHose: Mr. Courtiour, are you superintendent of repairs for the Bethlehem Steel Company, shipbuilding division, here in San Pedro?

A. The hull repairs.

Q. The hull repairs? A. Yes, sir.

Q. How long have you been engaged in the ship repair business? A. Over 40 years.

Q. Have you been with the Bethlehem Steel Company for some time? A. 23 years.

Q. And you have been at San Pedro for how long out of that time?

A. All that time with Bethlehem. I was there before, of course.

Q. When you say you are superintendent of hull repairs, that means that you are in charge of repairs to the hull of a ship as distinguished from the engine, is that [326] correct? A. Yes, sir.

Q. Someone else down there is superintendent of engine repairs? A. Yes, sir.

(Testimony of William J. Courtiour)

Q. If a ship comes in and requires plate work to be done, does that come within your jurisdiction?

A. Yes, sir.

Q. You were superintendent of repairs on August 6, 1944, were you? A. Yes, sir.

Q. Do you know the tanker Frank Drum?

A. Yes, sir.

Q. You have done work on that vessel at various times, have you not? A. Yes, sir.

Q. Did she come into your yard for repairs in July, 1944? A. Yes, sir.

Q. Will you tell the court, just roughly, what the repairs consisted of?

A. The hull repairs consisted of damage to the shell and general repairs to bulkheads or decks or hatches, whatever was found necessary.

Q. Did you do quite a bit of work on that vessel? [327]

A. Yes.

Q. How long was she in the yard approximately?

A. She entered the yard, I believe, on July 26th, and left the yard August 18th.

Q. Were you on board her on various occasions during that time? A. Yes, sir.

Q. In connection with the work that you did, Mr. Courtiour, I show you a repair contract, which has been introduced in evidence as Respondent Bethlehem Steel Company's Exhibit D, and ask you if you were superintendent of the hull repair so far as that contract is concerned. A. Yes, sir.

The Court: Is that Exhibit D?

Mr. McHose: Exhibit D.

(Testimony of William J. Courtiour)

Q. Mr. Courtiour, in connection with that contract, did you do some shell plate work in the way of the port bunker tank? A. Yes, sir.

Q. What was that work?

A. The removal of some shell plates and the repairing of same, fairing the same.

Q. What do you mean by the fairing of plates?

A. If a plate is slightly dented, we fair it in places. We do not remove it.

Q. You straighten it out? [328]

A. Yes, sir; we straighten it out.

Q. In order to do that work, Mr. Courtiour, on what part of the ship was it necessary for you to go?

A. On the port side.

Q. Did you have to do any work from the inside?

A. Yes, sir.

Q. In order to do the work which you did from the inside, what part of the ship did you go into?

A. Into the bunker tank.

Q. How did you get into the bunker tank?

A. Through a hatch on the main deck.

Q. Was there any other means of ingress to or egress from that tank? A. No, sir.

Q. Can you identify for us, Mr. Courtiour, the blueprint of the ship here? Do you recognize that as a blueprint of the Frank Drum? A. Yes.

Q. Will you step down and point out to the court the entrance to the bunker tank?

The Court: Is there any difference of opinion on where this work was done?

Mr. McHose: No; I agree with your Honor. This is preliminary and probably not important. It is the point marked "X" there. [329]

(Testimony of William J. Courtiour)

The Court: I think we all agree that that is the place where you have to enter.

Q. By Mr. McHose: And that was the only means by which you could come into the bunker tank to do this work that you had contracted to do? A. Yes, sir.

Q. Before you go into the bunker tank, Mr. Courtiour, is it necessary to do anything with respect to possible gas in a tank?

A. The tank must be cleaned and gas free before we can go in.

Q. Do you know who did your work on this occasion?

A. The California Ship Service Company.

Q. The California Ship Service Company?

A. Yes, sir.

Q. Were they employed by Bethlehem to clean the tank?

A. They were subcontractors; yes, sir.

Q. Do you know whether the ship itself did anything with respect to the gas cleaning?

Mr. Hon: Just a minute, your Honor. As to the answer "subcontractors," I will object to that, in so far as libelant is concerned, as a conclusion of the witness and not binding on the libelant, that the California Ship Service Company did it and were subcontractors. I think that is a conclusion. And, if there is any attempt to say that that particular work [330] or that particular opening was left there through them, then we would have to have the facts or the contract that was made with the California Ship Service Company.

Mr. McHose: Mr. Hon, I think you are borrowing trouble.

Mr. Hon: If I am borrowing trouble, I will withdraw it.

(Testimony of William J. Courtiour)

Mr. McHose: The facts are that the California Ship Service Company was employed by the Bethlehem Steel Company to do this work.

Q. The work is called for by the contract and it is to be responsible? Is that correct, Mr. Courtiour?

A. Yes, sir.

Q. And the California Ship Service Company did the work of cleaning out the tank?

A. That is right.

Q. What did they do to clean out the tank?

A. They wiped it down with rags and pulled the sludge out, whatever sludge is in the bottom, with buckets.

Q. Before that is done, is anything done with respect to steaming the tank?

A. The tank must be steamed.

Q. Who does that work?

A. That is usually done by the ship's crew.

Q. Do you know when that was done in this case?

A. That was done, I believe, when she came to the yard.

Q. Then, after she came to the yard, the Cali- [331]
fornia Ship Service people finished it up?

A. That is right.

Q. Did you obtain a certificate from a chemist that the tank was free of gas and safe to work in?

A. Yes.

Q. Do you know on what date you obtained that certificate?

A. August 3rd.

Q. When did you begin work in the tank?

A. It might have been that day or night. It was on or about August 3rd.

Q. Was work done there on August 4th?

A. Yes.

(Testimony of William J. Courtiour)

Q. And was work done there on August 5th?

A. Yes.

Q. Will you tell the court now what your practice is in doing that work, who actually does the work, and who is in charge of it and how it was done?

A. When a ship comes to the yard, a specification is prepared and distributed to the superintendents and the foremen. The foremen then immediately proceed with the work there and, of course, it is the duty of the superintendent to see that the work is started and that it is proceeding satisfactorily every day.

Q. Do you know about how many different gangs [332] were used in this work in the bunker tank?

A. It would take, at the most, four of any one department.

Q. What do you mean by that?

A. The first men that would be necessary after the tank is gas freed would be the men to build the scaffold, that we call the stage builders. That would be four men.

Q. You build a scaffold down inside of the bunker tank?

A. That is right.

Q. In order to do that, do you take tools and materials and things down into the tank?

A. Yes.

Q. How is that done?

A. That is lowered through the hatch.

Q. Do you put up a pulley and line?

A. We may, and, if the crane cannot reach it, we have to put up a gin ball.

Q. Do you know what was done in this case?

A. I think the crane could reach this case and lower it down.

Q. Go on with the names of the different gangs.

(Testimony of William J. Courtiour)

A. After the stage builders are through, then it would necessitate the bolter-ups, which would be two men putting the bolts in the holes after the plate has been removed and [333] replaced, and, after that, the holder-on and the passer when it comes to riveting the plates.

Q. Were these plates riveted or welded?

A. Riveted.

Q. Were there quite a number of men who went down into that bunker tank during the time this work was being done?

A. Not at any one time. The most that would be necessary would be four or five men at any one time.

Q. Different gangs would go down different times?

A. Different times.

Q. And what kind of ships were you working on at that time?

A. Oh, generally, our ships, I believe it was, at that time.

Q. You would have one group of men working 10 hours and then another working 10 hours, and four hours in order to keep working, is that right?

A. That is right except on Saturdays, when we got out at 3:30.

Q. Was the 5th of August, 1944, a Saturday, do you remember?

A. Yes, sir.

Q. Did you quit work at that time?

A. Yes, sir.

Q. When did you resume work? [334]

A. Monday, the 7th.

Q. At what time? A. 7:00 o'clock.

Q. During the time this work was going on, Mr. Courtiour, will you state whether or not it was necessary to leave the bunker hatch cover open?

(Testimony of William J. Courtiour)

A. It was open all the time that the work was going on.

Q. Why was that?

A. To allow men to get in and out and to get material in and out.

Q. Was there any other reason why it was kept open?

A. Well, to keep the tank free. A tank will foul up with foul air unless there is circulation of air.

Q. Unless a tank has been gas freed, is it necessary to keep it open and ventilated until you have finished working there?

A. Yes, sir.

Q. Do you know about when you completed the work of the port bunker tank?

A. I couldn't give you the exact date. It would be around the 12th. Pardone me; the tank was busted, which might have thrown it up around the 17th.

Q. You did work in that tank on the Monday after August 5th?

A. Yes, sir. [335]

Q. Do you know when the California Ship Service Company workmen first went into the bunker tank?

A. I would say about the 1st. It usually takes them a couple of days to clean a bunker tank.

Q. Do you know when your own workmen first went in there?

A. We wouldn't go in until the gas free certificate was issued, which was the 3rd.

Q. And you worked in there continuously, did you, from that time on until the work was completed?

A. Yes, sir; except over the week-end.

Q. Now, you did stop work, I think you said, at 3:30 on Saturday afternoon?

A. Yes, sir.

Q. Do you know whether any work was done on the ship by the shipyard on Sunday, the 6th?

A. Not to my knowledge.

(Testimony of William J. Courtiour)

Q. Do you have any personal knowledge of an accident which occurred at the bunker hatch on Sunday evening the 6th?

A. I heard about it on Monday when I went to the yard.

Q. You know nothing about it other than that?

A. No, sir.

Q. Other than what you heard after you arrived there?

A. That is all. [336]

Q. During the time that the work was going on in the yard, Mr. Courtiour, were representatives of the Associated Oil Company on board the ship?

A. Yes, sir.

Q. Did you see them on various occasions when you boarded the ship?

A. Yes, sir.

Q. Do you know what they were doing on the ship?

A. I couldn't tell you any particular job that they were doing. I would see them around the ship when I went on board.

Q. Did they have anything to do with the repairs that you were making?

A. Sometimes they offered suggestions but they did not do the repairs.

Q. The work was actually done by your men?

A. Yes, sir. Sometimes they worked on their own work, cleaning or painting.

Q. Do you remember how many of them were on the ship at the time?

A. I couldn't tell you the exact number; approximately 12 or 15 men.

Q. Did you see different men at different times?

A. That is right.

(Testimony of William J. Courtiour)

Q. Was there any power on the ship while she was in the [337] yard?

A. Electric power, do you mean?

Q. Well, let me put it this way. Were the ship's engines or auxiliaries operating?

A. Not to my knowledge.

Q. Did the shipyard provide power for the ship?

A. Yes, sir.

Q. Including electric power? A. Yes.

Q. Will you state to the court how that power was provided?

A. A line is connected to the switchboard to furnish lights to the ship's lights, and it also furnished plug boxes so that temporary cords can be plugged into the boxes on the ship wherever the men are working or into the gang-way.

Q. You plug into the main ship's line with electric power? A. Yes, sir.

Q. When that is done, how are the lights on the ship turned on and off?

A. If it is in the rooms, of course, it is done by the men occupying the rooms. If it is out on the deck, whoever needs light plugs it into the plug box.

Q. How about the lights on the mast, the regular ship's lights? [338]

A. That would be turned on, of course, by the ship's crew because those are switches.

Q. Those are the same switches that are used when the ship is at sea? A. Yes.

Q. But, in addition to that, you put temporary electric plug boxes at points on the deck?

A. Yes, sir; that is right.

(Testimony of William J. Courtiour)

Q. In order to get a light from one of those, a light is plugged in? A. Correct.

Q. How is that turned on?

A. As soon as it is plugged into the box, it makes contact, that is, with a live plug box.

Q. So that all that is necessary is to plug it into the box and then you get the lights? A. Yes, sir.

Q. And that power is maintained all the time?

A. Yes, sir.

Q. And, to get a light from one of those plug boxes, you have to plug it in right at the box? A. Correct.

Q. You can't turn an individual light off or on from ashore? A. No. [339]

Q. Mr. Courtiour, when your men are using a hatch, such as a bunker hatch, as a door to go into a part of the ship, is there any custom as to what you do when you stop work in that part of the ship?

A. Not in that type of a hatch. Of course, we just come out. It has a raised coaming and we do not do anything there.

Q. Do you leave it open?

A. That is the custom.

Mr. Hon: Just a minute. I object to that statement, that voluntary statement that that is the custom. I don't think that is binding on Richardson. I don't think there is any foundation laid for it.

The Court: It may be a custom and may be today's custom.

Mr. Hon: Your Honor, I will leave it for argument.

Q. By Mr. McHose: When you are using a place like that and you leave it, you leave it open, is that correct?

A. Correct.

(Testimony of William J. Courtiour)

Q. Anyhow, that is your custom, is that it?

A. It is regular marine shipyard practice.

Q. But it is your custom, is that it?

A. Yes, sir; where the hatch is close to the bulkhead, as that one was.

Q. Mr. Courtiour, do they work on board ships at night [340] on occasions? A. They do; yes.

Q. Also during the daytime? A. Correct.

Q. In fact at this time you were working 20 hours out of 24? A. At that time.

Mr. McHose: I think that is all.

Mr. Gallagher: Do you want to examine first?

Mr. Hon: You go ahead.

Cross Examination

Q. By Mr. Gallagher: Mr. Courtiour, if you do work at your shipyard and, in the course of the work, you remove safety measures like railings and guards and matters of that kind, is it your custom or the custom of your company, when you finish the job, to just ignore the replacing of the railings and the guards and walk off and leave it?

A. If there is a rail, we put a rope and, if there is a chain, we put the chain back. That is the custom.

Q. In other words, it has been the custom of your company to replace whatever safeguards were present at the time you started your work? A. Yes.

Mr. McHose: When do you mean, Mr. Gallagher?

Q. By Mr. Gallagher: Let me put it this way. Assume [341] you go to work in the morning of a day, and at the time you start work there is an open hatch with ropes to guard it to prevent people from falling into it, and in order to do your work, it is necessary for you to remove

(Testimony of William J. Courtiour)

the ropes and stanchions, when you get through at night. Is it the custom of your company to leave the open hatch there without replacing the guard ropes?

A. If there is a rope there, the men are instructed to replace the rope.

Q. In other words, it is the duty of the men to make a place secure when they leave it at night?

A. If it is unsafe.

Q. In other words, whenever they get through that work, if they are going to be off the ship overnight or over a week-end, your men are instructed to do whatever is necessary to make that place safe?

A. We have safety meetings and we instruct the men to work safely.

Q. And that is their job?

A. Whenever there is a hazard, that they realize or feel is a hazard, that they will try to protect it.

Q. As I understand it, your men are instructed, whenever they leave an open hatch, to rope it off if it is going to be open all night?

A. That is, if the opening is flush with the deck but, [342] if it has a raised coaming, no.

Q. If a hatch has a coaming of eight inches, is it the custom of your company to have its employees leave it overnight without any protection of any kind?

A. That is shipyard practice.

Q. Is that your practice?

A. Yes; where it is alongside a bulkhead, as this was.

Q. Is that your practice, even though the bunker hatch may have been roped off when you first went aboard the ship?

A. I would say, if the bunker hatch was roped off and our men removed the rope, they should put it back.

(Testimony of William J. Courtiour)

Q. Whenever they left the ship, they should put it back? A. Yes, sir.

Q. In other words, if that particular bunker hatch had been roped off when the ship came into the shipyard, then your men were instructed to replace those ropes whenever they would leave the job for overnight or a week-end, is that right?

A. If you mean that they were definitely instructed at that job, I would say no, because —

Q. I mean general instructions.

A. The general instructions are that the men must leave the ship as safe as they can.

Q. As safe as they found it? [343]

A. Well, sometimes a ship may think it is necessary to put a rope around and we may not think it is necessary. Where there is a raised coaming, we don't think it is necessary to put a rope around.

Q. In those cases where you think maybe the ship has taken more precautions than are necessary, you omit those precautions?

A. At times it is done; yes.

Q. Did you go aboard this particular vessel before any work was done at all?

A. I can't remember. I would say no.

Q. So that you do not know of your own knowledge what the condition of this particular bunker hatch was at the time of the start of the work?

A. Other than it was unsafe for men. It had to be cleaned.

Q. It wasn't gas free? A. No.

(Testimony of William J. Courtiour)

Q. But I mean so far as the position of the bunker hatch cover itself and whether it was or was not guarded, you don't have any personal knowledge of that?

A. No.

Mr. Gallagher: I think that is all.

Cross Examination

Q. By Mr. Hon: Mr. Courtiour, at the time you started [344] working there, you knew that this bunker hatch, which was 4-½ feet wide at the top and 6 feet long, was only 2 feet from the port exit of the aft passageway, didn't you? A. Yes, sir.

Q. You noticed there are only two feet from that open doorway, didn't you? A. Yes, sir.

Q. Do you consider it safe practice, from your 40 years' experience in shipyards, to leave an opening, 4-½ feet wide at the top and 6 feet long and 36 feet 7 inches deep, wide open at night time, when it is only 2 feet from a doorway?

A. That leads from a passageway.

Q. Do you consider that safe practice.

A. Well, it is done.

Q. Just a minute. Do you consider that, in your experience, safe practice?

Mr. Gallagher: I think Mr. Hon objected to a question the other day, when somebody asked somebody about what safe practice was.

The Court: You both opened the door and went into the matter fully and I think he may cross examine.

Q. By Mr. Hon: Is that, in your opinion, safe practice? A. It is the practice. [345]

(Testimony of William J. Courtiour)

Q. No, sir; I am not asking you that. As the court said, it might be a bad practice. I want to know, in your opinion, if that is a safe practice to leave that open. Now, get this; a bunker hatch, at the top 4-1/2 feet wide, 6 feet long and 36 feet 7 inches deep and 2 feet from a doorway leading from a passageway where the officers' mess and the petty officers' mess are right by that doorway. Do you consider it safe practice to leave that wide open 2 feet from a doorway? Is that safe practice, sir?

A. It is the custom in our yard. We —

Q. I am not asking you that.

The Court: Let him answer the question.

A. We have the finest record of any shipyard in the United States from the Safety Council.

Mr. Hon: Just a moment. I move that be stricken.

The Court: The reporter can't get this down when you are both talking. You may move to strike whatever you don't like.

Mr. Hon: I move to strike the voluntary statement of the witness about the extraordinary safe practice that this company has a record of.

The Court: That motion is granted.

Mr. Hon: Mr. Reporter, will you read the question, please?

(Question read by the reporter.) [346]

Mr. McHose: I assume, Mr. Hon, that you intend also by that question to assume that the ship is in a shipyard undergoing repairs at the time.

Mr. Hon: Just the way that was. A. Yes.

Q. By Mr. Hon: You consider that safe practice?

A. Yes sir.

(Testimony of William J. Courtiour)

Q. And you consider it safe practice to leave it there and not even be roped off, is that right, sir?

A. Yes, sir; during repairs.

Q. And you consider it safe practice to leave it that way of a night time, too? A. Yes, sir.

Q. And you knew, Mr. Courtiour, when you undertook the work on that ship, members of the United States Coast Guard would inspect that ship at different times, including night time as well as day time, didn't you?

A. I knew that was the custom.

Q. And you knew, sir, that the members of the Coast Guard in inspecting that ship would go all over the entire ship, didn't you? A. Yes.

Q. And you knew, sir, that in inspecting that ship at night time the members of the Coast Guard would be likely to enter or come out of either the port or the starboard [347] passageway, didn't you? A. Yes, sir.

Q. And you knew that, in coming out of the port passageway they might take any course on that ship that they saw fit to take, isn't that right?

A. You can't do that on a ship.

Q. You knew that they had a right to inspect any portion of that ship, didn't you?

A. I thought they were equipped with flashlights.

Q. Never mind that. You knew they had a right to inspect the entire ship, didn't you, sir?

A. Surely.

Q. And, with that knowledge, you say that, even two feet from that port passageway, it was safe practice to leave that open, is that right, sir? A. Yes, sir.

Q. Why do you say that you left that open?

A. To allow men to go up and down and circulation of air.

(Testimony of William J. Courtiour)

Q. It was primarily to allow men to go up and down or circulation of air, to allow circulation, is that right?

A. Circulation of air, I would say first, and then to allow men to go up and down.

Q. And, when you quit work at 3:30 Saturday, you knew you would have no men working on that ship until the following [348] Monday morning didn't you?

A. Yes.

Q. So you didn't expect your men to go up and down that bunker hatch between 3:30 o'clock on Saturday afternoon, August 5 1944, and Monday morning, August 7th, did you?

A. Correct.

Q. So, in leaving it open, your purpose was to allow circulation, is that right?

A. Yes.

Q. In your opinion, sir, then, when you quit work, was it necessary to have it wide open absolutely to get circulation?

A. You get some circulation that way.

Q. But it wasn't necessary, after it had been gas freed, to leave it absolutely wide open, was it?

A. Not absolutely; no, sir.

Q. You knew that this cover to the bunker hatch had what we call a stiff leg, didn't you, sir; that you could leave that bunker hatch at about a 45-degree angle?

Mr. McHose: Wait a minute, Mr. Hon. That photograph there has not been introduced in evidence. You can use the other one if you want to.

Mr. Hon: I will get it another way.

Q. I am going to show you a photograph here and I am going to ask you if that fairly represents the cover to that [349] bunker hatch that you were working on.

A. Yes, sir.

(Testimony of William J. Courtiour)

Mr. McHose: Your Honor, my point on that photograph —

Mr. Hon: I am not offering it, Mr. McHose. I am merely showing this for another purpose. I am merely showing this witness what has been offered as Tide Water Oil Company's Exhibit E for identification.

Q. That fairly represents, I believe you said, the bunker hatch cover, doesn't it?

A. That does.

Q. So, Mr. Courtiour, there is no question in your mind, sir, but what that bunker cover could have been left in the position that it is now shown in this exhibit and you would have had sufficient circulation here?

A. Yes; that would have given sufficient circulation of air.

Q. That would be quite sufficient circulation of air, wouldn't it? A. Yes, sir.

Mr. Hon: Now, your Honor, I will have to offer this as the Libelant's next succeeding exhibit, merely to show that this represents the way the bunker hatch appeared to this particular witness, and that in the position it is shown in this picture that would have been sufficient for the purpose for which they left it open on August 5, 1944, at 3:30 o'clock. [350] I offer it for that purpose and that purpose only.

Mr. McHose: I don't want to be difficult about this exhibit but, when Mr. Gallagher brought it up yesterday —

The Court: Of course, that is more or less a matter of argument, too. If it fairly represents the appearance of that —

(Testimony of William J. Courtiour)

Mr. McHose: The point of my objection goes to two things; first, that it does not represent the hatch as it was at the time of the accident because it is on the stiff leg and not back; and, secondly, somebody has doctored it up with a lot of ropes, which is something that didn't exist at the time of the accident. Of course, the law is well established that a photograph cannot be introduced to show the way a premises should be, on the theory of one of the parties to the litigation, by changing it around from what it was. But this is an admiralty action and we haven't a jury and I am not going to make a point —

The Court: The court will disregard in that photograph every consideration referred to except the position of that cover and the sustaining upright.

Mr. McHose: I think we can all agree, if it had been on the stiff leg, there wouldn't have been as much danger of someone falling in it.

The Court: It may be received for that purpose.

The Clerk: Libelant's Exhibit 7 in evidence. [351]

Mr. Hon: That is all I have. I have no further questions.

Recross Examination

Q. By Mr. Gallagher: Mr. Courtiour, did you anticipate that members of the Coast Guard or anybody else who might board that particular ship would be walking around in the vicinity of that bunker hatch cover at night, when that particular ship was dark?

A. I didn't anticipate that they would be, Mr. Gallagher.

Q. Do you think it would be safe practice for a Coast Guardsman, in making an inspection, to go into a lighted passageway, like this starboard passageway, walk around

(Testimony of William J. Courtiour)

in bright light through the starboard passageway, and then just pull a curtain aside and step out onto that deck of the tanker, let the flap close behind him, and then take a step, without attempting to see where he was going or what he was going to step on?

Mr. Hon: Just a minute. That is a long question. I would like to have it again before it is answered.

The Court: I think we will take a recess during the noon hour. It is after 12:00 and that matter can be renewed after lunch. We will take a recess until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock of the same day.) [352]

Los Angeles, California, February 13, 1947, 2:00 o'clock
p. m.

The Court: You may proceed.

WILLIAM J. COURTIOUR,

the witness on the stand at the time of recess, being previously duly sworn, resumed the stand and testified further as follows:

Recross Examination (Resumed)

Q. By Mr. Gallagher: Mr. Courtiour, this morning you were asked by Mr. Hon whether it was safe practice to leave the bunker hatch open and you said you thought it was.

Mr. McHose: Mr. Gallagher, I think you have a question pending.

Mr. Gallagher: That is right; I have a question that is unanswered. May I have that read?

(Testimony of William J. Courtiour)

(Question read by the reporter.)

Mr. Hon: I don't believe that you have correctly cited the conditions, first. I think that the testimony shows that he pulled back the curtain, put his left foot out and then brought his right foot out and took a step and went down.

The Court: Just a moment. Is this man testifying as an expert? Are you asking a hypothetical question?

Mr. Gallagher: I am cross examining him along the same lines Mr. Hon did.

The Court: I know, but he can't give any opinions unless [353] he is testifying as an expert.

Mr. Gallagher: I don't think that he is expert.

The Court: I doubt whether the form of the question is proper in the way in which you put it, calling for a man's opinion and conclusion. That is for the court to determine.

Q. By Mr. Gallagher: Mr. Courtiour, you did express an opinion that it was safe practice to leave this bunker hatch open while the ship was in the yard undergoing repair but I don't recall whether you gave any reasons for that opinion. What reasons do you have to back up that opinion?

A. In view of the fact that it has got a coaming around the opening.

Q. What has that got to do with it?

A. The man would have to step over 8 inches to step into the hatch.

Q. And that would be higher than the usual height above the surface that a man would raise his foot in taking an ordinary step? A. Yes.

(Testimony of William J. Courtiour)

Q. Mr. Courtiour, I want to show you two photographs and ask you whether the first is a correct representation of the port side of the main deck of the Drum forward of the opening out of which this young man said he came.

A. Yes, sir.

Q. That shows the catwalk, which is more towards the [354] starboard than towards the port, and ladders going up to the catwalk?

A. That is correct.

Mr. Hon: I never did see that catwalk, Mr. Gallagher.

Mr. McHose: I don't think that photograph has been marked yet.

Mr. Gallagher: No. I am going to offer it in evidence now.

The Clerk: Is this offered jointly?

Mr. Gallagher: It doesn't make any difference to me.

Mr. McHose: It can go in jointly.

The Court: Who is offering it?

Mr. Gallagher: I am offering it.

The Court: Is there any objection?

Mr. Hon: No.

The Court: It may be received and marked.

Mr. Hon: I don't know anything about the picture.

Mr. Gallagher: The witness said it was a picture of it.

The Clerk: Respondent's Exhibit F.

Q. By Mr. Gallagher: Mr. Courtiour, I show you another photograph and ask you if that is a representation of the bunker tank looking down into it from the deck.

A. Yes, sir.

Q. And, as you look at the photograph with the date "3-8-46" at the bottom of the photograph, can you tell

(Testimony of William J. Courtiour)

us [355] whether the small beam that appears on the left-hand side of the bunker hatch is closest to the port side or closest to starboard?

A. Yes, sir; the port side of the hatch.

Mr. Gallagher: May I write that on this photograph, your Honor, "starboard," so that it will appear in the record — or "port," I mean?

Mr. Hon: What is it you want to write?

Mr. Gallagher: This is the port side.

Mr. Hon: Well, write "port" out here.

Mr. Gallagher: All right; "port" out here.

Q. By Mr. McHose: That photograph is taken looking directly down on the hatch, is that it, Mr. Courtiour?

A. Yes. Here is the hatch cover against the bulkhead. The doorway would be here.

Mr. Gallagher: I will offer that photograph as Respondents' exhibit next in order.

The Court: It may be received.

The Clerk: Respondents' Exhibit G.

Q. By Mr. Gallagher: Mr. Courtiour, when work was being done at night by the shipyard crew, did you have a yard electrician who would come over and place the lights that were required by the workmen employed by Bethlehem?

A. Just what we call the temporary light man.

Q. And those lights would be attached to cords [356] and would be placed wherever it was necessary to have them?

A. Yes, sir.

Q. And those, of course, are illuminated by power from shore?

A. Yes, sir.

Q. You would just have your temporary light man bring on his portable boxes or connections and put them

(Testimony of William J. Courtiour)

wherever they were required and then insert the light plug cord in that? A. Yes, sir.

Q. Mr. Courtiour, who would be the one to give orders to the employees of the shipyard with reference to the work that they did on the ship?

A. Will you state that question again?

Q. Who would give orders to the shipyard employees with reference to everything that the shipyard employees would do aboard the ship?

A. The employees' immediate boss did. In some cases the men, or in most cases, the men have a leading man. There is a leading man for about every 10 men and above him a foreman.

Q. So that any work that was done by members of the staff of Bethlehem or the employees of Bethlehem would be done pursuant to orders received from someone immediately superior to them in the employ of Bethlehem, of the Bethlehem Steel [357] Corporation?

A. Not always. Sometimes men take responsibility themselves. They are not told every move to make.

Q. What I mean is this. When work is being done on a ship, the ship's crew doesn't give orders to your employees?

A. They will ask sometimes that things be done.

Q. I mean they won't say, "You do this," and "You do that"? A. Yes.

Q. They may make requests, is that right?

A. Yes, sir.

Q. Who was the superior of this temporary light man?

A. The foreman electrician.

Q. And the foreman electrician was an employee of Bethlehem? A. Yes, sir.

(Testimony of William J. Courtiour)

Q. And who would be the employees of Bethlehem who would rope off places that might appear to be dangerous, in the event they were to be roped off by employees of Bethlehem?

A. Usually the stage rigging department.

Q. And who is in charge of that department?

A. That department comes under the shipwright foreman.

Q. You don't know of your own knowledge what, if any, employees of Bethlehem came aboard this vessel within a half an hour after the accident happened, do you? [358]

A. Not to my knowledge.

Q. You can't say whether any did and neither can you can that no one did?

A. No, sir.

Q. You said something this morning about the fact that this particular bunker hatch was right close to a bulkhead and that that had something to do with your opinion that it was safe practice to leave this particular bunker tank open. Will you tell us just what connection the proximity of the bunker tank to the bulkhead had, in your opinion?

A. The after part of the hatch was right close to the bulkhead, within, I would say, six inches.

Q. That is, when the bunker tank cover was leaned back, it was right up against the bulkhead?

A. Correct.

Q. So that, if any man walked close to the bulkhead, he would come in contact with that tank top?

A. Sure.

Q. Mr. Courtiour, you have been in that ship repair business, you say, for about 40 years and 23 of those years have been spent with Bethlehem, is that right?

A. Yes, sir.

(Testimony of William J. Courtiour)

Q. So that you have had an opportunity to see hundreds and hundreds of oceangoing vessels?

A. Yes, sir. [359]

Q. Isn't it true, in all your experience, you have never seen fire extinguishers placed outside, where they would be exposed to weather?

A. I can't remember seeing any on the outside.

Q. These fire extinguishers that are carried by ocean-going vessels, the portable type, I mean, are always kept inside so that they won't corrode or be exposed to water or fog or other deteriorating agents, isn't that true?

A. That is true.

Mr. Hon: Is this within the scope of the cross examination or is this Mr. Gallagher's witness at this time?

Mr. Gallagher: That was the only question I wanted to ask about that.

Mr. Hon: I don't think it is within the scope of the cross.

The Court: I don't think it is.

Mr. Gallagher: Well, I will make him my own witness for the one question.

Recross Examination

Q. By Mr. Hon: Mr. Courtiour, your answer is about those fire extinguishers, whether or not you remember seeing any — your answer is that you just don't know?

A. There is none to my knowledge.

Q. You didn't see whether there was or wasn't isn't that right? [360]

A. There was none on the outside.

Q. But on tank ships in general, you just wouldn't say you know about this, would you?

(Testimony of William J. Courtiour)

On this one there weren't any but other tank ships might have had them in that place, isn't that right?

A. The hundreds I have had experience on board with I haven't seen any on the outside. There is always a fire hose and a fire connection on the outside.

Q. In other words, as a general rule, on that aft bulkhead, where it meets 'midship, you have seen fire hose on occasions there, is that right? A. Yes, sir.

Q. But not extinguishers? A. No, sir.

Q. And the fire hose is considered as a part of the fire apparatus of the ship? That is part of your fire apparatus, isn't it?

A. Fire protection.

Q. One other question. I am going to at this time refer to Respondents' Exhibit C and, particularly, I am going to refer to what they call the coaming at the threshold of the doorway on the port side. What I am referring to is this coaming right here at the threshold of this port doorway. Do you see it?

A. Yes, sir. [361]

Q. How high is that coaming?

A. It must be 18 inches, according to law.

Q. It has to be 18 inches according to law?

A. Yes.

Q. And your best opinion is that that is 18 inches, is that right? A. Yes, sir.

Q. You never measured this coaming of the bunker hatch in question when the lid was up, did you?

A. I don't think I put my rule to it. I have put hundreds down.

Q. You would say that is about four or five inches, wouldn't you?

A. No, sir; that is 8 inches at least.

(Testimony of William J. Courtiour)

Q. And you are sure that the coaming at the doorway is at least 18 inches, sir?

A. Yes, sir. That is the law, because of water.

Mr. Hon: All right, sir. Thank you.

Redirect Examination

Q. By Mr. McHose: I have one or two other questions. Referring to Respondents' Exhibit F, Mr. Courtiour, will you tell us what this object is immediately below the ventilator to which I am pointing? That is a ventilator, is it not?

A. Yes, sir.

Q. And what is this little place here? [362]

A. That is the entrance to the pump room.

Q. Will you point that out to us on the blueprint?

A. Right here.

Q. It is marked here on the chart "Pump Room Entrance"?

A. Yes, sir.

Q. And there is also marked on here "24-inch ventilator"?

A. Yes, sir.

The Court: Where is that point?

Mr. McHose: This point right here, just immediately forward of the bunker hatch we have been talking about.

Q. Mr. Hon has asked what that is and I will ask you to tell the court what the entrance to the pump room is.

A. The pumps for pumping the cargo out of the ship are down in that compartment.

Q. In order to get to the pumps, you enter the pump room and go down the ladder, is that right?

A. Correct.

Q. Now I want you to look for a moment at Respondents' Exhibit A and I point to a large pipe running across deck approximately 'midships. Can you tell us what that is?

(Testimony of William J. Courtiour)

A. I would say that was the discharge line.

Q. Would you be able to estimate about what size that pipe is?

A. About 12 inches. It is either 10 or 12 inches. [363]

Q. And that runs up here and down the deck, does it, Mr. Courtiour?

A. Yes, sir; and comes up over the stern.

Q. Immediately forward above the bunker hatch — it doesn't show quite as well in this photograph as in some of the others. I am now showing you Joint Exhibits C and A. Is this a pipe that is immediately in front of the bunker hatch?

A. Yes, sir.

Q. And what size of pipe is that?

A. It looks to be about a 6- or 8-inch pipe.

Q. And what is this object, which looks like a wheel, which also is immediately in front of that forward port corner of the bunker hatch?

A. This is the bow and that is the hand wheel for opening and closing the valve.

Q. And about how high above the deck does that wheel stand?

A. The top of the wheel I should imagine was about 2 feet 6.

Q. This large discharge pipe is also raised above the level of the deck, is it not?

A. It is raised above to clear this pipe.

Q. So that the pipe we have been talking about, the 6-inch pipe, runs underneath the 12-inch pipe?

A. That is right. [364]

Q. Looking for a moment at Exhibit G, I would like to ask you if you will tell the court what these two longitudinal parts are that show in that photograph.

A. They are known to us as deck longitudinals.

(Testimony of William J. Courtiour)

Q. Those are made out of steel, are they?

A. Yes.

Q. And are they in the form of I beams or something of that sort?

A. Sometimes a channel and sometimes a bulb angle.

Q. Can you tell by looking at those what they are?

A. I can only see one flange. That is the top flange. If it has a similar flange underneath, it may be a channel or may be a bulb.

Q. Perhaps we can tell that in one of the other photographs. Perhaps you can tell that from Exhibit C.

A. It is either a bulb or a channel but it looks to me to be a flange right there.

Q. In any event, it is a solid beam that goes across the bunker hatch opening?

A. That is right. It cuts the hatch opening into three parts there.

Q. And it is at a level with the deck, is it?

A. Correct, right under the deck.

Q. Looking at Exhibit G, and I am pointing to an object in the center of the picture, will you tell us what that [365] is?

A. That is the ladder for going down into the tank and for getting out of the tank.

Q. So that someone who wants to go down into that tank — perhaps, if I turn this around this way, it would look better. This is the bulkhead, isn't it?

A. Yes, sir.

Q. Someone who wants to go down into that tank would step over the pipe here?

A. That is right.

Q. And then go down this ladder, is that correct?

A. Correct.

(Testimony of William J. Courtiour)

Q. Does that ladder go down straight or does it slant?

A. It slants.

Q. Mr. Gallagher asked you a couple of questions about the lights on the ship, Mr. Courtiour. At night, when someone wants a light on the ship other than — or I will ask you this. If someone wants to turn a light on on a ship, one of the ordinary ship's lights, what do they do?

A. The ordinary ships —

The Court: That was covered on his earlier examination. He said they just push a switch in the cabin, if that happens to be where they are.

A. That is correct if they are working in that compartment. [366]

Q. By Mr. McHose: In other words, all the light switches are working while the ship is in the yard, just as they would be working if the ship was out at sea?

A. Yes.

Q. And, to turn them on, you would just turn the switch?

A. Yes.

Q. In addition to that, as I understand it, to assist in doing repair work, you have temporary sockets?

A. Yes.

Q. And, in order to get a light from those, someone needs to take a light and plug it in?

A. That is right.

Q. Are lights provided and put on the ship which can be used for that purpose?

A. Yes.

Q. Anyone there who wanted a light would merely need to plug one of these in, is that it?

A. Yes. If one wasn't sure, he would send for the temporary light man, who would.

Q. If one of the ship's officers wanted a light and there wasn't one on the ship, what would he do?

(Testimony of William J. Courtiour)

A. They might ask the temporary light man to accommodate them but they perhaps would get one of their own. They have their own lights and reflectors. [367]

Q. That is, if they wanted one from the yard, they would ask the temporary light man to get one?

A. That is right.

Mr. McHose: That is all.

Recross Examination

Q. By Mr. Gallagher: You don't know what lighting equipment was aboard this particular ship on August 6, 1944, of your own personal knowledge, do you?

A. Only what was left in place when the men left it on Saturday.

Q. That is, the workmen from the Bethlehem Steel Company left certain lighting equipment there on Saturday? A. Sure.

Q. And what was that equipment?

A. It would be temporary lights in the vicinity where they were working.

Q. Where were you or were you there at the time they quit?

A. I was in the yard. I was not aboard the ship.

Q. Did you go aboard the ship at any time on Saturday, August 5th?

A. I can't remember, Mr. Gallagher.

Q. So that, of your own personal knowledge, you don't know what was being used on Saturday or what was actually left there on Saturday, do you? [368]

A. I know it is the practice — or I know that the lights that they would use, according to shipyard practice, would be left when they left the job.

(Testimony of William J. Courtiour)

Q. They wouldn't be using any of the lights in the daytime on the outside of the ship, would they?

A. No, sir.

Q. They would be using lights inside of the bunker tank and other enclosed spaces? A. Yes, sir.

Q. And those were the lights you referred to as being left there? A. Yes, sir.

Mr. Gallagher: That is all.

Mr. McHose: Now —

The Court: How many times are we going back and forth on this?

Mr. McHose: That is all, your Honor.

The Court: Are there any further questions?

Mr. Hon: No; I have no questions.

Mr. Gallagher: Do I understand you have finished?

Mr. McHose: Yes; I am through.

Mr. Gallagher: Mr. Schleef.

J. J. SCHLEEF,

a witness for the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:[369]

The Clerk: What is your name?

The Witness: J. J. Schleef.

Direct Examination

Q. By Mr. Gallagher: Mr. Schleef, where do you live?

A. In San Francisco.

Q. What is your occupation?

A. Chief engineer with the Tide Water Associated.

Q. How long have you been a chief engineer?

A. I would say about 15 years.

(Testimony of J. J. Schleef)

Q. How long have you been employed by Tide Water Associated Oil Company?

A. Nearly 24 years.

Q. Have you had any experience on the Frank Drum?

A. Quite a few years; about 14 years altogether.

Q. You were chief engineer on the Frank G. Drum at the time this young man was involved in an accident at the Bethlehem Steel Company dock?

A. Yes; I was

Q. Mr. Schleef, were you familiar with the general fire fighting equipment on that vessel?

A. Well, pretty much.

Q. Particularly, I would like to have you take a look at Respondents' Exhibit A, which shows the bulkhead immediately after the bunker tank that we are talking about, and I will ask you if there was ever any hydrant on that bulkhead. [370] A. No; never.

Q. That includes the top of it?

A. The top of it. The first hydrant on the main deck is forward of the pump room. The one aft is in the alleyway.

Q. So that there was no hydrant or hose anywhere along this bulkhead?

A. No, sir; not in that vicinity.

Q. When you say there was no fire hydrant in the vicinity, or when you say not in that vicinity, do you mean that there was a fire hydrant attached to that bulkhead or on that bulkhead? A. No; none.

Q. Where was the closest fire hydrant to that bulkhead?

A. Well, it was about 5 feet forward of the pump room scuttle, I would say, about 5 or 6 feet. That is the nearest one.

(Testimony of J. J. Schleef)

Q. When you say pump room scuttle, will you come and show us on this diagram where the pump room scuttle is?

A. That is this way. Of course, you could call it the pump room hose but the proper term is the pump room scuttle. And this is the port and that the starboard.

Q. When you say this hydrant was about 4 feet, forward of the pump room scuttle, you mean forward of the pump room? [371]

A. Yes.

Q. About in here?

A. Somewhere right in here.

Mr. Gallagher: May we mark that, where he says "in here," your Honor?

Q. By Mr. McHose: Was that right on the main deck?

A. Right on the main deck. That is the nearest one.

Q. Is that about right under the catwalk?

A. It is right underneath the catwalk, to the starboard side. It is right in line, I would say, with the frame —

Mr. Gallagher: I have marked "X-S" with this witness, the first letter of his last name.

The Court: Very well.

Q. By Mr. Gallagher: Mr. Schleef, with reference to portable fire extinguishers, were there any of those out exposed to the weather of the Frank Drum?

A. There are no fire extinguishers belonging to the ship on any weather decks or outside. They are all in the alleyways, around the quarters, top and bottom alleyways, the 'midship house and under the forecastle head and none on what we call the weather deck at the time.

(Testimony of J. J. Schleaf)

Q. None in any place where they would be exposed to any sea or fog or anything of that kind?

A. None at all. The only reason they don't have them [372] out there is they may get washed overboard.

Q. Mr. Schleaf, were you aboard the Frank G. Drum at it was coming into port for the purpose of annual inspection and repairs that year?

A. Yes, sir.

Q. And do you have any personal knowledge with reference to anything that was done to the port bunker hatch before the ship was brought into the Bethlehem Steel Company yards for repairs?

A. Well, it was opened for the purpose of gas freeing it after we got through butterworthing it. As a matter of fact, we had to open the hatch to butterworth it.

Mr. McHose: To do what?

A. That is a seafaring term. Butterworthing means this, a machine for cleaning the tanks with steam and water.

Q. By Mr. Gallagher: And the function of that machine is to aid in cleaning the walls of the tank?

A. The oil off of the walls.

Q. You call them bulkheads, don't you?

A. Bulkheads. We don't use "walls."

Q. And, when that was done, was the vessel at sea?

A. At sea.

Q. And, when that work was completed, as far as the cargo of the Frank G. Drum would permit, in what position was the tank cover left? [373]

A. It was left on what was known as the support, that iron bar there, in about a 45-degree angle.

Q. Was there any object placed around the tank?

A. There was a rope put around there. We put them around all open tanks.

(Testimony of J. J. Schleef)

Q. We are talking about this one now.

A. This one had a rope because we didn't have chains for it.

Q. Was that the condition of the tank of the ship at the time the ship was brought in and docked there at the Bethlehem Steel Company yard? A. Yes; it was.

Q. Was it felt in that condition up to the time Bethlehem started to do this work?

A. Until we went in to clean the tank, when they raised it.

Mr. McHose: I would like to take the witness for a couple of questions.

The Court: You may cross examine later.

Q. By Mr. Gallagher: I will show you Respondents' Exhibit E and ask you if that photograph is a fair representation of the manner in which the port bunker tank was fixed and secured and guarded at the time the ship was brought in there for repairs.

Mr. McHose: I think this is objectionable, as I said [374] this morning, this being a matter before he was injured. I will let him ask the questions but I would like to make it clear that this picture was taken after the accident happened and, as a matter of fact, somebody put that rope around there.

Mr. Gallagher: That is right. I haven't contended or mentioned at any time that that picture was taken before the accident.

Mr. McHose: Ordinarily, that is not admissible but, in view of the situation here, I will let it go in.

The Court: It merely illustrates a condition?

Mr. Gallagher: Yes, your Honor. I will ask Mr. Schleef that direct question.

(Testimony of J. J. Schleef)

Q. Mr. Schleef, does that photograph indicate the condition or the approximate condition in which the bunker tank hatch and the ropes and the stiff leg were at the time this ship was brought in and the shipyard commenced to make these repairs and do this work?

A. It was on the support the way it is here and it also had a rope, but it was not quite as much at that. It was put in more of a seaman-like manner because a sailor put it on there. It had a rope there and leading to the bulkhead. It has just one single line around.

Mr. McHose: That is just the reason why such pictures are not admissible in evidence ordinarily. Did it have a rope around it? [375]

Q. By Mr. Gallagher: It did have a rope around it?

A. It did have a rope around it.

Q. Was the rope which was actually in place at the time the ship was brought in there to the Bethlehem Steel Company's repair dock an effective guard around that opening?

A. Well, if you had stumbled or anything, you couldn't have fell in there for it had something to grab hold of. You couldn't get near the opening of the hatch.

Q. Mr. Schleef, with reference to the lighting conditions on the ship, under whose control were they?

A. That was entirely with the shipyard, the Bethlehem Steel in this case.

Mr. McHose: I object to that question as calling for the opinion and conclusion of this witness and I move that the answer be stricken out.

The Court: Will you read the question?

(Question read.)

(Testimony of J. J. Schleef)

The Court: The answer may be stricken for the purpose of your objection. I think your question is objectionable in this form.

Mr. Gallagher: It probably is, your Honor.

Q. Mr. Schleef, will you tell the court what the condition of the ship was from the time that it was delivered to that yard, with reference to power and machinery and all that sort of thing? [376]

A. Up to the time it was delivered to the yard?

Q. No; after it was delivered to the yard.

A. Well, within 24 hours after, or I would say about that, because it takes about that long to kill the boilers, we are supplied with air, water, lights and everything from ashore. We have no power furnished by the vessel.

Q. Tell the court how you are furnished power from ashore.

A. Well, the yard furnishes — or in what particular? Do you mean the lights and the water?

Q. The lights.

A. They hook up a set of wires to our main switchboard. That is for the ship's lights and for our different circuits, for the rooms, lights in the mast, deck lights or anything, and those that we have in the alleyways. They have another set of temporary wires that the yard furnishes from their connection on the dock, and they string wires along fore and aft of the catwalk and to different places with plug-in boxes, in order to plug in temporary lights, and even down below in the engine room — the extra lights they need, they furnish those wires and power for them.

Q. So far as actually turning a light on is concerned inside the covered portion of the ship, for instance, all you have to do is push a switch?

(Testimony of J. J. Schleef)

A. In each individual room or, if you want to cut out [377] a whole circuit, you would have to go down to the switchboard and pull a switch.

Q. On this particular tanker — will you take that photograph Respondents' Exhibit F and tell the Judge just where lights, which are permanently attached to the ship, are located out there on deck?

A. Well, the only lights we would have, which doesn't take it in here, are up in this mast, is what we call cargo lights, four lights. Then on the house, inside of the alleyway, there are no lights permanently located.

Q. And any other part of the ship?

A. Yes, sir; out on deck here and even inside of the pump room — the only outside lights there are are the mast lights. That photograph doesn't take in those cargo lights up in the mast. They are about 30 feet, I would say, from the deck.

Q. Then, there were no permanent light fixtures, which belonged to the ship, which could have been used to illuminate this bunker hatch?

A. There are no lights in that forward bulkhead; no.

Q. You would have to have some kind of a temporary light?

A. Temporary lights would have to be put there.

Q. A portable light?

A. A portable light. [378]

Q. Mr. Schleef, were you aboard the vessel the night when this young man was injured? A. Yes; I was.

Q. And where were you?

A. I was walking back and forth on the main deck — or not the main deck but the poop deck forward of my quarters, which is on the starboard side.

(Testimony of J. J. Schleef)

Q. Were your quarters up above the main deck?

A. Yes; they are up one deck higher.

Q. Were they in the after part of the ship or 'midship?

A. The after part.

Q. That is the poop deck?

A. That is the poop deck.

Q. And, from that place, could you see down on the engine room grating?

A. Well, I would have to go into the engine room door. There is a door leading between my quarters and the engine room and I would have to go back through the engine room door to look down.

Q. Was anybody with you that night?

A. The boatswain that was on the ship, whose name I don't remember, was walking back and forth with me. We were getting a little fresh air.

Q. Was that Basango?

A. I think that was his name. [379]

Q. From the place where you were walking up and down, could you see this young man come aboard the ship?

A. I happened to see him come aboard and I saw him crossing the top engine room grating at the time, because I had gone into the engine room to tell the oiler on watch to see that the boilers were dry and to pump them if they were not, and to turn in, and that is when I saw him going from the starboard side to port, and he went out the port alleyway. That is the engine room door. That would be on the main deck.

Mr. McHose: May I have that answer read?

(Answer read by reporter.)

(Testimony of J. J. Schleef)

Q. By Mr. Gallagher: Do you mean that you saw him come out of the port passageway and step out onto the deck?

A. Oh, no. This is from the engine room top grating, the door leading into the port alleyway, which would be about 40 or 50 feet from the door.

Q. At that time, Mr. Schleef, did you have any actual knowledge, any personal knowledge, of the fact that this bunker hatch was open? A. No; I didn't.

Q. Had you observed the shipyard workers around that bunker hatch from time to time in the daytime while they were working?

A. Well, yes, because I am more or less all over [380] the ship at different times.

Q. During the daytime, while they were working, and when you had an opportunity to observe them, did you see that this tank top was open?

A. Oh, yes; it was open.

Q. What were they doing around there when you observed them?

A. Well, when they first started, they had —

Mr. McHose: When you say "tank top," I assume you mean bunker hatch.

Mr. Gallagher: Bunker hatch.

A. Yes; the bunker hatch. They had a cleaning gang cleaning the muck out and, after that, the riggers, or I guess they call them riggers, the stage riggers, lowered their planks to build staging, but I didn't go into the tank myself. But I saw them from time to time working there and that was about three or four days before this accident occurred.

(Testimony of J. J. Schleef)

Q. They would have to open the bunker hatch in order to get this timber down in there?

A. Yes; to lower it. They probably lowered it with one of their own cranes and they would have to raise the hatch in order to lower the planks.

Q. Did you ever observe that bunker hatch open at any time? [381]

A. Well, no; I didn't because I wouldn't have an occasion to go around there. The men worked up till 3:00 o'clock in the morning and, at 4:00 o'clock in the afternoon, I got through with my day's work and I wouldn't be around there.

Q. That is, they were working day shift and night shift?

A. Yes; they worked about 18 or 20 hours a day straight through.

Q. When you say "they" were working there, you refer to the employees of the shipyard?

A. Of the shipyard.

Q. On August 6, 1944, did you hear any cries for help or whistling or anything of that kind?

A. Yes; shortly after I got back on deck, we heard somebody yelling, and we thought it was somebody fell over the side. There was a Navy tender laying alongside, and I thought maybe somebody fell over the side. But it was the boatswain who heard the noise in the tank. The voice then hollered and then he hollered for help. And then we looked in a different direction.

Q. Did you go over to this port bunker hatch?

A. Yes; we went then and helped the boy out.

Q. At the time you got there, was that bunker hatch open?

A. Wide open. [382]

(Testimony of J. J. Schleef)

Q. Up against the bulkhead?

A. Up against the bulkhead.

Q. Were they any lights there? A. No lights.

Q. Were there any ropes around it?

A. No ropes.

The Court: May I ask a question at this point? Let me have the photographs that show those ladders across that opening. This is the opening you referred to, is it?

Mr. Gallagher: Yes, your Honor.

The Court: I want to find out if those ladders were across that opening at that time.

A. Yes; ever since the ship has been built and they are there yet.

Q. By Mr. McHose: A permanent structure?

A. Yes; that is, the longitudinals underneath the deck.

The Court: How much space is there between the edge of the opening and the ladders there?

A. Well, I think they run about 24-inch centers and maybe 28 — I wouldn't say for sure. That is pretty close.

Q. By Mr. Gallagher: The one on the port side is closer to the hatch coaming than the one on the starboard side, isn't that true, or is that just the way the picture was taken? [383]

A. No. The one —

Q. I am referring to this one here. We have had that identified as the port ladder and it appears in the picture to be closer —

Mr. Hon: Just a minute, Mr. Gallagher.

Mr. Gallagher: I will withdraw that question.

Q. Is this ladder that I am drawing my finger along now as far away from the hatch coaming as this one over

(Testimony of J. J. Schleef)

here? What did you refer to when you said 24-inch centers?

A. Well, 24 inches between the two, on centers of the ladders, but it isn't the same space between the coaming there and this first ladder. I would say that is only about half the distance, at the worst.

Q. The ladder which is closest — or I will call it the port ladder. It is closer to the port side of the hatch coaming than the starboard ladder is to the starboard side of the hatch coaming?

A. Oh, yes; more than twice.

Mr. Gallagher: Is that what your Honor had reference to?

The Court: I would like to know this also. This Exhibit F is an exhibit of this same vessel, is it not?

Mr. Gallagher: Yes, your Honor.

The Court: What is right behind that spot that I am pointing to? What is that spot that I am pointing to, that [384] upraised part there?

A. That isn't an upraised part. This is the pump room scuttle that this eventually comes in. That is a house there.

The Court: And what is this here?

A. That is just dark underneath there.

The Court: And you can't identify that particular —

A. There is a little hatch there, that goes into the summer tank pump room, that is about 18 inches high, but it is not this hatch at all. That goes into the summer tank pump room.

Q. By Mr. Gallagher: Mr. Schleef, after you helped this young man out of the bunker hatch, where was he taken?

(Testimony of J. J. Schleef)

A. Well, we laid him on deck first and the Navy tender have doctors there and we sent for a doctor to attend to him. They wrapped his leg in a board and fixed him up on the stretcher and took him ashore, and the Coast Guard ambulance took him away.

Q. Was anything done to the bunker hatch right after this accident happened?

Mr. McHose: I object to that. I don't see any relevancy or materiality as far as after the accident happened.

The Court: It may have some bearing on it. He may answer.

Mr. McHose: Well, how, your Honor? [385]

The Court: If it hasn't, it doesn't count, does it? It may have some bearing on it.

Mr. McHose: I think the law is well established, your Honor, that, if something is done after an accident happens, it is not material evidence with respect to the cause of the accident. If Mr. Gallagher is going into the question of whether somebody brought a light or rigged up a rope or something of that sort, which I assume is what he is driving at, personally, I don't think it makes any difference whether that was done. Either the ship could have done it or we could have done it but whether we or they did it I don't think has any materiality.

Mr. Gallagher: I think it does, your Honor. If the ship did it, then it could be argued that the ship realized that the thing should have been roped off and lighted.

Mr. McHose: I don't think so, your Honor. The situation I am in is I don't know whether anything was done and, as I have said several times before, we didn't know we were going to be involved in a lawsuit until a

(Testimony of J. J. Schleef)

year after this happened. We have not been able to get any evidence as to what happened and I am not prepared to offer any evidence on that subject. And I think the law is quite well established, for example, in a city case, where there is an accident in an excavation, that evidence that somebody then brought out a red lantern and put it at the excavation is not admissible. [386] And we think this is exactly the same situation here. It is an attempt to show something that was done after the accident that wasn't done before. The only question is was there some negligent condition there before the accident and whose fault was it.

The Court: You say it is not admissible if a red light is placed at the scene of an accident, where there is an embankment or something of that kind?

Mr. McHose: After the accident has happened.

The Court: You say that is a rule of law?

Mr. McHose: That is my understanding.

The Court: On the same theory, what difference does it make what the libelant did, whether they sent him in an ambulance or what happened?

Mr. Gallagher: I think this is all part of the *res gestae*.

Mr. McHose: I don't think it is of any materiality and I think it is inadmissible.

The Court: I think it is admissible. It may or may not have bearing on the situation, probably not, but, at any rate, it happened so close, I imagine, after the accident happened — let's see what happened on these premises.

Mr. Gallagher: Your Honor will recall the Coast Guard intelligence officer. He testified, when he got

(Testimony of J. J. Schleef)

there, there was a light and a rope, and we are entitled to have explained [387] how it got there, if he knows.

The Court: Your objection is overruled.

Q. By Mr. Gallagher: Will you answer the question, Mr. Schleef?

A. Yes; there was a light in a place there and the hatch was put back on the support and a rope put around it. I don't know just how quick; maybe within half an hour, because they didn't show any speed in getting this boy ashore to do anything about his leg.

Q. Who put the light there and put the hatch down on the stiff leg?

A. It wasn't the ship's crew. It was Bethlehem's men because I recognized the temporary light man. When our lights went out at night in the quarters, we were to call for the temporary light man because it was up to them to furnish them lights.

Q. Do you mean that you called for the temporary light man?

A. Not on this case because that light didn't interest me.

The Court: I don't know whether that fact should be taken into consideration in determining just what happened then but it is so near the time of the accident that it may have some bearing in relation to the testimony given by the other witnesses. [388]

Q. By Mr. Gallagher: Did Bethlehem continue to do work in that particular tank after the accident?

A. Oh, yes, until that work was completed; I would say about 10 days maybe or in that neighborhood.

Q. Mr. Schleef, you testified that you had been on that particular vessel for a good many years.

A. Quite a few.

(Testimony of J. J. Schleef)

Q. There has been testimony that there was a canvas flap at the entrance to the starboard passageway and a canvas flap over here at the exit from the port passageway. I would like to have you state to the court whether there was any canvas flap or cloth flap or covering of any kind or character at either end of those passageways.

A. The only cover there was in the alleyways, to my knowledge, — I never saw a flap — was the water-tight doors themselves. It was not a canvas flap.

The Court: I don't think I understand you. Have you a photograph that you can illustrate with as to the questions you are asking? Are you referring to this particular door?

Mr. Gallagher: Yes, your Honor.

The Court: Now, what is your question?

Mr. Gallagher: My question is this, whether there was any canvas or cloth flap anywhere near the door. Your Honor will recall the young man said, when he went to go in to the starboard passageway, he pushed a flap back and stepped over [389] the coaming and walked back and made a turn and then, when he came out the port passageway, he took his hand and opened a canvas flap and stepped out. I want to find out whether there was or was not a flap of any kind in either of those doors at any time, including the night of the accident, so far as this witness knows.

The Court: Go ahead.

Q. By Mr. Gallagher: Mr. Schleef, was there any canvas or cloth flap anywhere near either of the openings at the forward end of that after house?

A. Never to my knowledge was there ever a canvas flap there.

(Testimony of J. J. Schleef)

Q. Was there any cloth flap or oil cloth or any other kind of a flap?

A. No; nothing but the steel door itself.

Q. How far from that steel door or opening was the closet light? A. Well, —

Mr. McHose: What kind of a light?

Mr. Gallagher: Well, an electric light, a permanent light.

A. The permanent lights in the alleyway — I think the nearest one was, I would say, about 15 or 16 feet to the opening of the door. That would be after the water-tight door.

Mr. Hon: Did I understand that is aft of the port passage- [390] way, at the rear there? A. Yes.

Q. By Mr. Gallagher: It is aft of the door through which the young man came? A. That is right.

Q. And that was about 15 or 16 feet to the opening of the door?

A. Just about where the last light is.

Q. Did that light furnish any illumination for the surface of the deck immediately outside of the hatch through which you made exit from that port passageway?

A. No. There is no light would shine because at the time this was during the war and we had shields on those permanent lights. They all had the wire guard and we shielded them with metal or tin so it wouldn't reflect out on the deck. So the passageway in that particular place is quite dark.

Q. So that there would be no light on the deck immediately outside of that hatch which would illuminate the deck at all?

A. None at all; no illumination.

(Testimony of J. J. Schleef)

Q. And was there ever any canvas or cloth covering over the hatch at the forward end of the starboard passageway? A. None there, either.

Q. You call doors hatches, don't you?

A. They are water-tight doors. [391]

Q. Going into the alleyway, do you mean?

A. Yes.

Q. There was no canvas or cloth or other covering excepting the water-tight doors at the forward end of either one of those alleyways? A. That is right.

Q. I will show you Respondents' Exhibit A, which shows the water-tight door at the forward end of the passageway. A. Yes.

Q. Is that the only kind of a covering that was ever at that port exit, to your knowledge, while you were on the boat?

A. That is the only one.

Q. And was there the same kind on the starboard side?

A. The same condition on the starboard side.

Mr. Gallagher: You may take the witness.

Cross Examination

Q. By Mr. Hon: Just a couple of questions, sir. I am now referring to Tide Water Exhibit E. When you brought your ship, the Frank Drum, into the Bethlehem Steel Company yard, the door or covering to the hatch was in the position as shown in this picture, wasn't it, on the stiff leg? A. Yes.

Q. Or what do you call it?

A. It is the support. [392]

Q. It was in that position? A. In that position.

(Testimony of J. J. Schleef)

Q. Why was it in that position?

A. Well, that is the way we always leave the hatches and, besides, anybody couldn't fall down there. It was for safety.

Q. In other words, you leave it there as a safety measure, is that right?

A. That is what you have to do.

Q. In other words, you are required to do it, aren't you?

A. Required to do it.

Q. To keep people from falling into it?

A. Falling into it.

Q. And good practice requires that?

A. I would say so.

Q. Why did you have the rope around it? Was it as an added precaution?

A. Well, a person may stumble there and, if you didn't have a rope around it — you know people going to sea don't always come aboard sober and you have to guard against those things.

Q. Alcohol didn't have anything to do with that, did it?

A. Not in this case where the boy broke his leg. [393]

Q. Now, Mr. Schleef, a couple of questions. As I understand, you say that there was no light closer to the port exit, marked Exhibit 2—there was no light closer than 15 or 16 feet?

A. To that.

Q. And that was a rather dim light, was it?

A. It was shielded. During the war we shielded them within so the light would show aft and not out the door.

Q. It was dark right there at the door, wasn't it?

A. It was dark.

(Testimony of J. J. Schleef)

Q. There was a door there, is that right?

A. Well, you might have seen the door because the inside alleyways are painted white.

Q. There was no light cast from the passageway out onto the 'midship deck? A. None.

Q. At or near the port passage opening?

A. No; you couldn't see any light out there.

Q. You saw Richardson come aboard the boat and knew he was a Coast Guardsman?

A. I saw him when he come up the main deck, up the gangway.

Q. You knew he was a Coast Guardsman making an inspection, or at least you assumed it?

A. Oh, yes. [394]

Q. You saw him pass around the engine room and go into this passageway, didn't you? A. I did.

Q. You were up on what?

A. I was up on the top engine room grating.

Q. In order words, he entered this port passageway leading forward? You saw him enter it and then didn't see him after that?

A. I didn't see him after he left the engine room and went into the port alleyway. I didn't see him again until we hauled him out of the tank.

Q. Mr. Schleef, how long had you been on the Frank Drum continuously prior to the happening of the accident?

A. From the 30th of July, 1937, up to that date.

Q. My question was misleading to you and I assume it is my fault. How long had you been continuously on the ship without getting off the ship, before the accident happened? In other words, you had been there at least

(Testimony of J. J. Schleef)

so long a time, without getting off the ship, when the accident happened.

A. I came aboard at about 3:00 o'clock Sunday afternoon.

Q. And the accident happened about 9:05 or somewhere around there?

A. Somewhere around 9:30 or so.

Q. You came aboard about 3:00 o'clock? [395]

A. About 3:00 o'clock.

Q. So that, when the accident happened, you had been aboard the ship for just 6-1/2 hours? A. Yes, sir.

Q. How long had you been off the ship prior to your coming back at 3:00 o'clock?

A. I went ashore about 8:00 o'clock that Sunday morning.

Q. On Sunday, I take it, then, that you left the ship at 8:00 o'clock in the morning and got back on at 3:00 o'clock? A. Yes, sir.

Q. And was on it up to the time of the accident?

A. Yes.

Q. Now, I am going to take 8:00 o'clock Sunday morning. How long had you been continuously on the ship prior to 8:00 o'clock Sunday morning?

A. Well, I wouldn't know. I went out to dinner Saturday night because we didn't feed aboard.

Q. About what time?

A. I would say I got back about 9:00 o'clock.

Q. Were you aboard the ship at 3:30 Saturday afternoon, August 6th, when they quit work, the Bethlehem?

A. No; I wasn't.

Q. At the times from 3:00 o'clock Saturday afternoon until Sunday night at 9:00 o'clock, or during the times

(Testimony of J. J. Schleef)

that you were off the ship, who was on the ship from the Tide Water [396] people?

A. There was always one engineer standing security watch and one oiler or fireman. Their names I don't even remember. Sunday I came back and relieved the first assistant, and he was standing engineer's security watch, and I let him go home because I was going to be aboard.

Q. During the time from 3:00 o'clock Saturday afternoon, and, when I say Saturday afternoon, I mean August 5, 1944, — from Saturday afternoon at 3:00 o'clock up until Sunday night at 9:00 o'clock or 9:30, had you at any time either gone in or come out of the aft port entrance?

A. No, sir.

Q. Had you been at or near or in close proximity to the port entrance passageway?

A. No. The first time I was on the port side was when I heard the boy hollering for help.

Q. And that was the closest you got to the port passageway?

A. There is a ladder right directly near the alleyway doors and I come aboard on the starboard side, and my quarters are on the starboard side and I had no occasion to go to the port side.

Q. Mr. Schleef, were any inspections of the ship, regular inspections, made, or were there regulation inspections of the ship made during August, 1944? [397]

Mr. Gallagher: Inspections by whom?

Mr. Hon: By anyone connected with Tide Water.

A. From my department — all I was interested in is what happened in the engine department. My job is to stand security watches and to see that the ship don't sink or that the bilges fill up and the like of that.

(Testimony of J. J. Schleef)

Q. In other words, as chief engineer, you have your duties.

A. I have my duties.

Q. There was a boatswain on board, wasn't there?

A. Yes.

Q. What would be his duties?

A. The security watch, as I understand, is mostly to see that the lines are kept tight so that she don't break away from the dock and the like of that.

Q. The boatswain's duties were separate and apart from the chief engineer's?

A. Oh, entirely.

Q. Can you tell us what the duties of the boatswain were while it was tied up there for repairs?

A. I think some mate on the ship could tell you better than I could.

Q. There was a third mate on the ship, wasn't there?

A. Yes; that particular night.

Q. And that was Mr. Basango? [398]

A. No. That is the name of the mate. It was Mr. Humble.

Q. Do you know what the duties of the third mate are?

A. He is here and can answer those questions better than I can.

Mr. Hon: The third mate is going to take the stand, is he, Mr. Gallagher?

Mr. Gallagher: Yes.

Q. By Mr. Hon: I believe you testified, didn't you, that at times you were all over the ship?

A. More or less, while work is going on.

Q. That didn't include the times when the workmen stopped, is that right?

(Testimony of J. J. Schleef)

A. No. I generally stop before they do. They work all night and I don't. I can quit at 4:00 o'clock in the afternoon.

The Court: Did you ever see a canvas flap at that opening, either before or after the accident?

A. No, sir; I never saw one either before or after. But the door could have been shut, the steel door.

The Court: The steel door?

A. It swings on hinges.

Q. By Mr. Hon: It swings on a hinge?

A. Yes.

The Court: Which way does it turn? [399]

A. It pushes outboard. In other words, as he come out, it would turn to his left.

The Court: Onto the 'midship?

A. Out onto the main deck.

The Court: It would push out in the direction he was going?

A. Oh, yes. It pushes outboard.

Mr. McHose: I think one of these photographs shows that pretty clearly.

The Court: I don't see anything in that opening at all. Is that the door?

A. That is the door there and that is the opening for the door and it swung open.

Mr. Hon: That throws the door back.

Mr. McHose: Your Honor, also on the blueprint the drawing shows that the door opens out this way, as you can see from the drawing.

Q. So that it fits back fairly flush against the bulk-head, doesn't it, Chief? A. It does.

(Testimony of J. J. Schleef)

Mr. Gallagher: Would I be accused of being a clock-watcher if I asked your Honor for a recess at this time?

Mr. Hon: That is all.

The Court: We will take a recess at this time for 15 minutes. [400]

(Short recess.)

Mr. Hon: I have just a couple of more questions, please.

Q. Mr. Schleef, what was the last time that you either walked in or out of the port passageway before the accident?

A. I couldn't answer that without definite knowledge because it may have been some time Friday, or I might have gone out of there Saturday morning.

Q. Well, Saturday morning before the accident would be the latest, wouldn't it?

A. That would be the latest; some time during the forenoon.

Q. Of your own knowledge, you do not know whether there was a canvas flap on that port entrance or exit at the time of the accident or not, of your own knowledge, do you?

A. Unless somebody put one up there from the last time I went through there. No; I couldn't say.

Q. Just one other question. This happened in war-time, August 6, 1944, and you made a statement that the lights were dimmed to the aft of the ship to keep the light off of the deck?

A. From shining out onto the deck.

Q. That port passageway and that port exit and entrance are used quite a bit, aren't they, in and out?

A. At what time?

(Testimony of J. J. Schleef)

Q. Well, at various times and, particularly, when there [401] are workmen on the ship.

A. In the shipyard, it was probably unhooked all the time. The dogs on the door would be unhooked while the ship was in for repairs.

Q. And that would leave the door open?

A. It might be open.

Q. Wasn't it required that the ships were required to keep all openings closed during the wartime?

A. In operation, we always had it dogged down.

Q. What do you mean by that?

A. The door has dogs on it, dogs, and they are clamped down. You have to use a hammer or pipe to open it.

Mr. McHose: Point those out to the court.

A. Yes. There are eight or 10 on each door.

Q. By Mr. Hon: Isn't it true in a passageway, where there were doors which were in constant use by people on ships, that they oftentimes left the doors open so that people could go back and through this passageway each time, and blockout the light by a canvas flap?

Mr. Gallagher: That is objected to as what might have been done on other ships.

The Court: You are wandering away from what happened here.

Mr. Hon: Your Honor inquired about it and that is the only reason I was following it up. [402]

The Court: I don't think there is any particular harm to his answering it if he can.

A. This particular ship that I was on didn't have any canvas flaps, but the upper alleyways, which would be subject to more light, had what they called black-out doors that you would walk around. In other words, one over-

(Testimony of J. J. Schleef)

lapped the other and you had to walk like in a mystic maze to find your way around, and it wouldn't show light, and these were dogged down at all times only when we were in port, in daylight, to get in stores, but that is all. Mr. Hon: That is all.

Mr. Gallagher: Before Mr. McHose gets started, I want to offer this photograph Respondents' Exhibit E in evidence. It is only marked for identification at the present time.

The Court: It may be received.

Cross Examination

Q. By Mr. McHose: Chief, you were in the employ of the Associated Oil Company for quite a long time before this accident happened? A. Yes, sir.

Q. And you were in the employ of the Associated Oil Company at the time it happened? A. I was.

Q. You continued on salary, did you, while the ship was in the shipyard?[403] A. Oh, yes.

Q. Was the same thing true with the rest of the crew of the ship?

A. Everybody that worked on there gets their pay or they would go home.

Q. And you were paid by the Associated Oil Company? A. Sure.

Q. Who else was working on the ship while it was in the yard? Do you remember? Just roughly.

A. Do you mean of the Tide Water employees?

Q. Yes.

A. Well, we had three engineers and about six in the crew or maybe eight in the crew. I had nearly a full crew in the engine department.

(Testimony of J. J. Schleef)

Q. Was there nearly a full crew in the deck department? A. I couldn't say as to that.

Q. There were also licensed deck officers?

A. Licensed deck officers.

Q. And there was always at all time while you were there a licensed engineer? A. Yes, sir.

Q. And also a licensed deck officer? A. Yes, sir.

Q. And your job was up in the engine room?

A. Yes, sir. [404]

Q. So you didn't have any particular responsibility other than in the engine room?

A. Other than the repair work.

Q. Tell me what you mean by that?

A. Well, the port engineer is aboard during repairs and I assist him, and we have to see that the work is carried on, to see that it is done according to specifications.

Q. To make sure that the shipyard does a good job?

A. To get as good as you can get.

Q. Did you have anything to do with the repair to the plates that necessitated going down into the bunker hatch?

A. Not until they had them in and tested the plates for leaks.

Q. And then you checked up on that?

A. It was either myself or the port engineer.

Q. Had you been down in the port bunker tank while this work was going on?

A. Not while the work was going on.

Q. You said, on direct examination, the work continued in this bunker tank after the accident happened.

A. I would say I think the work continued for about a week or so.

(Testimony of J. J. Schleef)

Q. What I want to be sure about is this. There wasn't any work going on there that night, was there?

A. Not Sunday night; no. [405]

Q. In fact, the shipyard stopped work Saturday afternoon and resumed it again Monday morning?

A. Yes.

Q. So that the night the accident happened there wasn't anybody working down in the bunker hatch?

A. Not at that particular time.

Q. Do you know who was the roving guard on the ship on the night at the time that the accident happened?

A. I don't know his name, naturally.

Q. I don't mean the Coast Guardsman. I mean the roving guard that is provided by the ship.

A. The deck department have a security watch but there is no roving guard. The Coast Guard is the only one that furnished a roving guard.

Q. The federal regulations, Chief, call them a roving guard, to be on duty at all times. Now, are you familiar with that or don't you know anything about it?

A. Oh, yes; I saw them, what they call a marine guard.

Q. Was there a roving guard on the ship at that time?

A. There was one at the gangway, I know, because I saw him.

Q. There was a gangway guard, was there?

A. Oh, yes.

Q. And the law requires a gangway guard be maintained at all times? [406]

A. At all times.

Q. And that man was in the employ of Associated Oil Company?

A. Yes; I guess they hired him for that purpose.

(Testimony of J. J. Schleef)

Q. Did you see any of the Bethlehem Steel personnel on the ship the night this accident happened, before the accident? A. Before the accident, no.

Q. With respect to the lights, I want to be quite clear about this. When you came into the yard, you shut down your plant on the ship?

A. Yes; I shut down the plant.

Q. In order to get electrical power on the ship, you took a power line over and plugged that into their main electrical system, did you not?

A. Yes; they hook it on our main switchboard.

Q. And that makes it so that every light switch on the ships works just as it would as if you were using your ship power, just the same? A. Yes.

Q. And, anybody that wants light on the ship throws a switch? A. Yes.

Q. And there were permanent lights, I think you said, up in the masts? [407]

A. Yes, sir; about 30 feet up.

Q. Where is that on the blueprint?

A. The main mast ought to be about right there. It says "Mast."

Q. That is quite a little way forward of the bunker hatch, isn't it?

A. Yes; about half-way between the 'midship house that runs right in here and the bunker.

Q. How many feet, roughly, would that be from the bulkhead to the mast?

A. Well, I would say it is a good 80 feet or say 70 or 80 feet.

Q. And there are a lot of obstructions, aren't there, between the mast and the bunker hatch? A. Yes.

(Testimony of J. J. Schleef)

Q. Including the pump room scuttle, as you call it?

A. Yes.

Q. Do you know whether the lights on the main mast were on that night?

A. I couldn't say. I never shut them off. That is the reason they leave them on day and night in the shipyard. The shipyard furnishes the light. The mate is the one who can turn it off, if he wants to, and turn it on and would be more apt to know. For the masts they are up in the 'midship house, the panel board. [408]

Q. You were down there at the scene of the accident shortly afterwards?

A.* Shortly afterwards.

Q. Do you remember whether the lights on the main mast were on at that time?

A. I am almost sure they were on. They are on all the time.

Q. Did they provide any illumination at this hatch?

A. Not enough.

Q. What do you mean by that?

A. Not enough to light up the deck. It was dark around the hatch.

Q. In addition to the running of the power line to the ship's main electrical system, the shipyard also runs temporary lines on board, doesn't it?

A. Yes; the full length of the ship and down in the engine room.

Q. There are a great many places on board where you have got to have lights in order to see to do work?

A. Yes.

Q. And one place in particular would be the bunker tank in which they were working?

A. Oh, yes.

(Testimony of J. J. Schleef)

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Q. In addition to the running of the power line to the ship's main electrical system, the shipyard also runs temporary lines on board, doesn't it?

A. Yes; the full length of the ship and down in the engine room.

Q. There are a great many places on board where you have got to have lights in order to see to do work?

A. Yes.

Q. And one place in particular would be the bunker tank in which they were working? A. Oh, yes.

(Testimony of J. J. Schleef)

Q. They would have to run temporary lines down there? A. Yes. [409]

Q. And the same thing would be true in other parts of the ship?

A. Yes, sir.

Q. What do you need to do to plug a light in?

A. They have connections, you know, and they just push it in the socket. They have regular boxes, with maybe six or eight connections.

Q. It is just an electric light plug?

A. That is what it is.

Q. You can plug in any kind of a light that is on a cord? A. Sure.

Q. You have on board the ship portable lights, have you not?

A. Yes; we have portable lights but they wouldn't plug in those systems. We had a different type of plug entirely.

Q. You have plugs where you can plug in on the ship your own portable lights?

A. Our own portables; yes.

Q. As a part of the ship's system, for instance, if you wanted to rig a gangway, you would get a portable light and plug it in somewhere and run it over the gangplank?

A. Yes.

Q. I think you said that you had ordered somebody to do something just shortly before the accident happened. What was [410] that? To see that the boiler was dry?

A. One of the security watch that was in the engine room, the oiler or fireman — he was down in the engine room and I whistled down and told him, if the bilges were dry, to go to bed and, if they weren't, to pump them out and for him to turn in.

(Testimony of J. J. Schleef)

Q. That was just one of the duties?

A. The routine of the man on watch, the security watch in the engine room.

Q. While you were on board the ship, Chief, to whom did you report? Who was your superior officer?

A. The port engineer while we were in the shipyard.

Q. Was the captain on board?

A. Not that night.

Q. He was on board while you were in the yard, was he?

A. Yes; he was there week days, but he probably went ashore Saturday morning. They all take turn in standing watches.

Q. But, while you were there, the port engineer supervises the repair work and he is the man to whom you report? A. Yes, sir.

Q. Was he on board the night the accident happened?

A. No; he wasn't.

Q. After you butterworthed the tanks, Chief, — am I correct in understanding that you did that job on the ship? [411]

A. That was done at sea.

Q. That means you steamed out the port bunker tank?

A. Yes, sir.

Q. You knew the work was going to be done?

A. We knew the work was to be done.

Q. And, after you steam out a tank like that, you leave the hatch open for ventilation purposes, don't you?

A. Oh, yes.

Q. It is important to do that?

A. It is important.

(Testimony of J. J. Schleef)

Q. And, when the ship got into the yard, it was also necessary to wipe the tank down and to see it was gas free?

A. Yes; so the men could work in there.

Q. Men are not permitted to work in a tank until they get a certificate from a chemist certifying it is safe for men and for fire?

A. Yes. It may be gas free and yet not safe for fire. In other words, they call it hot work or fires in a compartment. It wouldn't be safe for that.

Q. So, before Bethlehem could start working on this tank, they would have to have a certificate from a chemist that it was safe for men and safe for fire?

A. Absolutely.

Q. Did you see workmen from the California Ship Service Company doing work there? [412]

A. I couldn't say who they were but I surmised it either them or Martin's men that cleaned that tank. It may have been the Bethlehem. They generally hire the California Ship or Martin gang.

Q. They are companies that specialize in that?

A. Yes, sir.

Q. And somebody did come on board and work on the tank for some little time before work actually begun, is that correct?

A. I think it took them about two days for them to clean it out.

Q. When did they come into the yard?

A. We knew they came in on the 26th, looking up the records.

Q. Did you notice whether the Ship Service people took the rods off the hatch that you described to us?

(Testimony of J. J. Schleef)

A. I couldn't say whether it was the Ship Service people. It wasn't the ship's crew.

Q. How do you know that?

A. Because none of them worked there.

Q. You didn't have anything to do with the deck crew, did you?

A. No; not with the deck crew.

Q. You don't know that of your own personal knowledge? A. No. [413]

Q. The mate is the ship's officer who has charge of the deck, isn't that correct?

A. He probably could answer that question.

Mr. McHose: I think that is all.

Mr. Gallagher: That is all.

Mr. Hon: That is all.

Mr. Gallagher: May the witness be excused, your Honor?

Mr. Hon: I will stipulate he may be excused.

Mr. Gallagher: Mr. Humble.

ASA HUMBLE,

called as a witness on behalf of the respondent Tide Water Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Asa Humble.

Direct Examination

Q. By Mr. Gallagher: Mr. Humble, where do you live?

A. San Diego.

Q. What is your occupation? A. Seaman.

(Testimony of Asa Humble)

Q. In 1944, were you employed by the Tide Water Associated Oil Company?

A. I was part of the year.

Q. Were you employed by that company in July, 1944, and August of 1944, during the month of August and part of the month of July? [414]

A. I went aboard the 17th of July, 1944.

Q. Were you aboard at the time the ship came in to the Bethlehem Steel Company repair yards?

A. Yes; I was.

Q. Were you aboard while it was at sea, on the way to that place? A. I was.

Q. Were you aboard at the time some preparatory cleaning was done in the port bunker tank?

A. I don't recall the actual fact that the work was done. However, I was aboard from the time we discharged the last cargo until the time we entered the shipyard.

Q. Do you remember the fact that some work was done on that bunker hatch or tank?

A. I wouldn't say specifically that. I know that we were cleaning the cargo tanks and that could be among them.

Q. Did you have any opportunity to observe the condition of the port bunker hatch at the time the ship was brought in and tied up at the Bethlehem Steel Company dock?

A. I could have had but I don't recall.

Q. You don't know whether it was roped off or closed, then?

A. I couldn't say definitely.

Q. Did you at any time know that the bunker hatch was left open — [415]

(Testimony of Asa Humble)

A. Not while the ship was in the shipyard.

Q. — up to the time this accident happened?

A. Will you ask that question again, please?

Q. Did you ever see this bunker hatch open at night, while the ship was in the repair yard, before this Coast Guardsman fell into the tank?

A. I don't recall of having seen it open.

Q. Were you aboard the vessel on the night of the accident?

A. I was.

Q. And what were you doing?

A. I was on in the capacity of a security watch, a deck officer.

Q. What was your rank or rating?

A. Third mate.

Q. Will you tell the court what you know about this accident?

A. My first knowledge of the accident was when Mr. Schleef came to my room and informed me that there had been an accident, and I immediately went out on deck. The man had been removed from the ship and at that time was on the dock, and prior to that I have no knowledge of how it happened whatsoever.

Q. After the accident happened, did you see anybody come aboard with lights or any other equipment? [416]

A. I don't recall having seen it.

Q. After the accident happened, was anything done to the port bunker hatch that you know of?

A. Well, it was roped off and a light was placed over it.

Q. You don't know who did it?

A. I don't recall who did it but I did not order the deck force to do it.

(Testimony of Asa Humble)

Q. That is, you gave no orders to anybody in the crew to do anything like that?

A. That is correct.

Q. And where would such order have to come from, if it had been done by members of the deck department?

Mr. McHose: I object to that —

Mr. Gallagher: I will withdraw the question.

Q. Was there anybody else aboard who could have issued such an order, excepting you, that night?

A. Will you restate that, please?

Q. Was there anybody aboard who could have issued such an order to the deck department, that night, excepting yourself? There was no other member of the deck department who had supervisory capacity over the crew members of the department excepting you?

A. Excepting me.

Q. You were the only officer aboard so far as the deck [417] department is concerned?

A. That is correct.

Q. Mr. Humble, had you had experience with these Coast Guard roving guards before the night of the accident?

A. Yes.

Q. Was there any general custom down there at San Perdo with reference to what they did?

A. The usual procedure was for them to contact me on board and secure information which would enable them to fill out a regular mimeograph form which they carried.

Q. And what were the things they would inquire about and put down on this mimeographed form?

A. One item which seemed to be of very much importance was the fire watch and the cables made fast

(Testimony of Asa Humble)

to the bits of the ship or wire ropes leading out over the side to within five or six feet of the water's edge; also, a portable extension light near the cable, and this would enable the ship, which was dead at the time, to be towed away from the dock in the case of an emergency. Other things they inquired about sometimes is they would ask the engineer officer on watch about so they could complete their form. Then one was questions pertinent to the fire equipment aboard.

Q. When these Coast Guard roving guards would come aboard and get that information from the mate, then what would they do as a general course? [418]

A. They would ordinarily leave and, after that, I would see them no more. However, I do recall of having them come aboard at two different times during the night. Usually they would come aboard earlier in the evening and around midnight.

Q. Making the same inquiries?

A. The same inquiries and the same form.

Q. Mr. Humble, do you recall whether the cargo lights were on on the night of the accident?

A. I do not. However, I know, being in port, it is customary for us to put them on. But I do not recall whether they were on on this particular night.

Mr. McHose: Do you mean the lights up on the main mast?

Mr. Gallagher: Yes; the light up on the main mast.

Q. Is that the one you are talking about?

A. Yes, sir; that is correct.

Q. Were there any lights or light fixtures out on the main deck or above the main deck, excepting on the main mast?

(Testimony of Asa Humble)

A. To the best of my knowledge, we had, and I don't know who rigged it, a flood light on the catwalk, which was a number of feet above the deck, reflecting its rays of light toward the gangway.

Q. That is, the gangway which was on the starboard side? [419]

A. To the dock; yes. And there may have been other lights at the gangway. I don't recall.

Q. Did you have any occasion to go near this particular bunker hatch at any time while the vessel was in the shipyard? A. No, sir.

Q. Was there any work done by any members of the crew at or about that port bunker hatch during the time the vessel was at the shipyard?

A. Not to my knowledge.

Mr. Gallagher: Take the witness.

Mr. Hon: I have no questions.

Cross Examination

Q. By Mr. McHose: Mr. Humble, how old are you?

A. 30.

Q. How long had you been going to sea in 1944?

A. Approximately 3-½ years; in the Navy from 1934 and in the merchant service from June 15, 1943.

Q. And you had a third mate's license, did you?

A. From October 12, 1943, I believe.

Q. The night of the accident you were the senior deck officer on board the ship?

A. That is correct.

Q. And the ship was under your control, was it?

A. I wouldn't say that. [420]

(Testimony of Asa Humble)

Q. You were the senior officer on board?

A. The senior deck officer aboard; the only deck officer aboard.

Q. The chief engineer was also aboard?

A. He was also aboard.

Q. You had joint control with him? Is that what you mean?

A. I wouldn't say that.

Q. If anybody wanted to report something, if something was out of the ordinary and some one of your crew found it out, to whom would they report?

A. It would depend on what department it pertained to.

Q. If it was in the deck department?

A. I assume they would report it to me. That is not always the case, however.

Q. That is what they are supposed to do?

A. Well, it is customary to report to your superior officer.

Q. There wasn't any other officer on that ship who was superior to you?

A. In the deck department, no.

Q. Now, you said that you didn't know who brought a light out and put ropes around this place after the accident happened that night.

A. That is correct. [421]

Q. You didn't give any orders for any of your crew to do it? A. I did not.

Q. But someone might have done it without you giving them orders, without you knowing it, isn't that true?

A. I didn't know who did it and I gave no orders to do it.

(Testimony of Asa Humble)

Q. Someone on the ship might have done it or someone from the shore might have done it?

A. That is true.

Q. The floodlights that you have spoken about— you turn those on from some point on the ship, do you not?

A. The cargo lights. There is a switch to control them.

Q. And what about this floodlight that was at the gangway? Where is that turned on?

A. That I do not know because I do not know who rigged it and I don't know where it was turned on from.

Q. You didn't happen to light it yourself at any time?

A. No.

Q. What about the portable extension light that you spoke of a few moments ago? Where was that?

A. That was on the offshore side at the bow and at the stern of the ship.

Q. Who rigged that light? [422]

A. The deck department is required to rig that.

Q. Who would turn that on at night?

A. It was my duty to see that was done, as the security officer on watch.

Q. And you did that? A. I did that.

Q. Did you also have a portable extension light hanging down over the propeller?

A. Not necessarily the propeller but over by the stern of the ship.

Q. And that was also turned on by you?

A. Yes, sir.

Q. And, at night, any lights you wanted on the ship, you merely would go over and turn them on?

A. Under ordinary circumstances; yes. It could have been at times there were circuits cut out.

(Testimony of Asa Humble)

Q. But you did have electrical power plugged into the ship from the shore?

A. I know I had power in my room. It was reported that the plant was shut down.

Q. You had portable extension lights aboard the ship, did you not?

A. With marine fittings. By that I mean a large fitting with contacts on either side, and these are placed in a marine box, with a cap on it. They are not the ordinary [423] male type of plug.

Q. But you did have places on the ship where —

A. We had marine outlets on the ship to which that could be attached.

Q. Were you using ship's portable lights for the extensions over the bow and the stern? A. Yes.

Q. The kind that you have just described?

A. Those were required before we went into the shipyard, as a port security measure.

Q. And, if you wanted other lights, you could have directed the shipyard to provide them for you, could you not?

A. I could have but I don't recall ever having done it.

Q. Do you know who was serving as the roving guard on the ship at the time the accident happened?

A. I do not.

Q. You had a roving guard on the ship, did you not?

A. I couldn't swear to that.

Q. Are you familiar with the regulations for tank vessels within the Los Angeles-Long Beach defensive sea area?

A. May I see it, please? I don't recall ever having seen that book. However, I do recall of having seen a

(Testimony of Asa Humble)

small blue book, about three or four inches, that had something to do with those regulations, which had something about port security. [424]

Q. Would this be the little book that you speak of?

A. I believe that is it.

Q. Are you familiar with the regulations in here that provide that a ship in port should have on duty at all times a roving guard?

A. I am not familiar with it now. It could have been that I was then. I don't recall whether I saw that before I went aboard the ship or after.

Q. If there had been a roving guard on board the ship, he would have reported to you?

A. No; they never report to us.

Q. To whom did they report?

A. I don't recall of them ever having reported to me.

Q. Were there gangway guards on the ship during this time?

A. I don't recall that.

Q. You did not personally give any instructions as to duties to guards on that ship?

A. No, because I don't recall the guards.

Q. Were you on board the ship on Saturday, the 5th of August? A. No to my knowledge.

Q. When did you go on board?

A. Some time prior to the accident, Sunday.

Q. Who had been the watch officer in charge prior to [425] the time you went on board?

A. It was either of the other mates, Mr. Vanover or Mr. Frederick.

(Testimony of Asa Humble)

Q. Were you standing regular watches at that time?

A. Not regular schedule watches; no. Just one mate was required to be on board.

Q. You worked at it between yourselves?

A. That is right.

Q. And you don't know who was on board Saturday afternoon? A. No.

Q. And you don't know who was on board Sunday morning before you were? A. No; I am not sure.

Q. What time did you go on board?

A. It was some time prior to the accident, I believe, Sunday.

Q. Mr. Humble, would you expect a Coast Guardsman, going on board that ship for inspection purposes, to go out onto an unlighted deck of the ship at night?

Mr. Hon: I object to that —

The Court: The objection is sustained, what he would expect.

Mr. McHose: No further questions.

Mr. Hon: No questions. [426]

Mr. Gallagher: That is all.

Mr. Vanover. I would like to have this last witness excused, your Honor.

The Court: Is there any objection?

Mr. Hon: No, your Honor.

Mr. McHose: No objection.

The Court: He may be excused.

ALBERT D. VANOVER

called as a witness on behalf of the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Albert D. Vanover.

Direct Examination

Q. By Mr. Gallagher: Mr. Vanover, where do you live?

A. Long Beach, California.

Q. What is your occupation?

A. I am on leave from the seafaring profession and at present employed as a boat builder.

Q. As a what?

A. As a boat builder.

Q. Were you employed by the Tide Water Associated Oil Company in July and August of 1914?

A. Yes, sir.

Q. Mr. Vanover, I will hand you respondent Tide Water Exhibit E and ask you if you ever saw the port bunker hatch [427] of the Frank G. Drum in a condition similar to the condition shown in that photograph and with rope guards somewhat like that.

A. I have seen the port bunker tank on the stiff leg or brace and secured with a line or chain, but I have never seen that line put on by a seaman such as this.

Q. The rigging of the line there is an unseamanlike job, isn't it?

A. Very much so.

Q. When did you see the port bunker hatch on the brace or stiff leg, with a rope guard rigged around it, with reference to the time the ship was taken into the Bethlehem Steel Company's shipyard?

(Testimony of Albert D. Vanover)

A. I am not positive that I saw that actual bunker hatch, on the Frank G. Drum on a stiff leg, roped off, in the Bethlehem Steel Company yard. I have seen them roped off but I am not positive if that was the case in the shipyard.

Q. Then, you don't recall whether the bunker hatch was roped off at the time the vessel was taken into the shipyard?

A. I do not recall that; no.

Q. Do you know anything about this accident that happened, of your own personal knowledge?

A. Nothing about the accident of my own personal knowledge. All that I know about it is hearsay.

Q. Did you at any time give any orders to any members [428] of the deck department to take any ropes away from the port bunker hatch?

A. That was not in my jurisdiction to.

Q. You were second mate or what?

A. Second mate.

Q. Did you ever give any such order? A. No.

Q. Did you have any personal knowledge of the fact that the port bunker hatch was open? A. No.

Q. You had nothing to do with the repairs?

A. Nothing at all.

Q. Do you know where the fire extinguishers were located on that vessel?

A. I know that they were located in a place that they would be easily accessible.

Q. Were they outside or inside?

A. Always inside.

Q. Were there any hydrants along the forward bulk-head of the after house?

A. I could not swear to that, as I do not remember.

(Testimony of Albert D. Vanover)

Q. Have you told us everything that you know about this case, if anything?

A. Yes, sir.

Mr. Gallagher: That is all. [429]

Mr. Hon: If he doesn't know anything about it, I don't know why I should cross examine him.

Mr. Gallagher: I wanted to produce as many officers as I could that were on duty at the time.

Cross Examination

Q. By Mr. McHose: Did you ever instruct any roving guards about their duties? A. Never.

Mr. McHose: That is all.

Mr. Hon: I will stipulate he may be excused.

Mr. Gallagher: You may be excused. Mr. Frederick. Your Honor, this witness may take more time; in fact, I think he will; and I have one other witness coming tomorrow and that will finish it. If your Honor would take an adjournment now, I think we can still get through in about an hour in the morning.

Mr. McHose: I would like very much to push this thing along. I simply have to be through by 11:00 o'clock tomorrow morning if I can possibly do so. I think we can get a good bit of the direct examination finished this afternoon.

Mr. Gallagher: I am willing to go ahead.

Mr. Hon: I don't care, just whatever you gentlemen want.

The Court: We can proceed for 10 or 15 minutes and maybe you get through with the witness by that time. [430]

ADRIAN ROLLAND FREDERICK,

a witness for the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Adrian Rolland Frederick.

Direct Examination

Q. By Mr. Gallagher: Where do you live, Mr. Frederick? A. Los Angeles, sir.

Q. What is your occupation?

A. Well, my occupation at present is I am a retired seaman.

Q. For how long did you go to sea?

A. About 30 years.

Q. And during that time were you employed by the Tide Water Associated Oil Company?

A. Yes, sir.

Q. Were you on the Frank G. Drum?

A. Yes, sir.

Q. In what capacity?

A. As the chief officer or mate.

Q. And for how long had you been chief officer of that vessel?

Mr. Hon: Do you mean prior to the accident?

Mr. Gallagher: Yes.

A. I would have to look at my book in order to give [431] you the exact date. I don't recall it.

Q. Was it a question of years or months, weeks or days?

A. Months; several months.

(Testimony of Adrian Rolland Frederick)

Q. Mr. Frederick, do you know in what position and condition the port bunker hatch on the Frank G. Drum was at the time the ship was taken into the Bethlehem Steel Company's shipyards?

A. I do. I give the orders to secure it.

Q. Will you tell the court what the condition was and what was done?

A. I will.

Q. All right.

A. The hatch was resting on a leg attached to the lower side of the hatch itself or the door. This leg held the hatch open at about 45 degrees; in other words, about half-way open. This tank had been steamed out, washed out with the butterworth system of hot water and steam, and also aired out, for about five days before we entered the shipyard.

The Court: Go ahead.

A. And, besides this, there was a small what we would call on board a ship two-inch line attached to the bulk-head and laid around this hatch and fastened to the after side of the pump house. While it was only a light line, it would prevent anybody from accidentally falling into the hatch. In other words, it was just simply a safety measure in case some- [432] body might want to get down there.

Q. By Mr. Gallagher: Mr. Frederick, do you know who — withdraw that. Was the port bunker hatch in the condition you have told us about up to the time the Bethlehem Steel Company started to do work on that ship?

A. It was.

Q. And was it in that condition up to that time?

A. The condition that I have just described.

Q. Was that safeguarding removed by any member of the ship's crew?

A. It was not.

(Testimony of Adrian Rolland Frederick)

Q. During the time that the Bethlehem Steel Company's workmen were aboard the ship, did you observe them working at and in the vicinity of the port bunker hatch?

A. It was my duty to observe all work. Well, just one minute. Being the chief officer of this ship, it was my duty to be on board that ship, from 8:00 a. m. until 5:00 o'clock in the evening every day, to assist the port engineer Mr. Lundin in checking and seeing that the repair work was performed or carried out that was necessary for the ship. I also had charge of my boatswain and crew, and there is only certain work the crew can do in a shipyard. There are a number of things that the crew wouldn't do in a ship on account of the regulations.

Q. What are some of those things that the crew can't do?

Mr. McHose: Of what materiality is that?

Mr. Gallagher: I want whatever evidence is available.

The Court: You are going into a pretty wide field, what those members of the crew didn't do.

Mr. Gallagher: I will confine it, your Honor.

Q. Mr. Frederick, during the time the Bethlehem Steel Company was doing work in that port bunker tank, was there any duty to be performed by any of the ship's crew in or about that tank?

Mr. McHose: I object to that as calling for the opinion and conclusion of the witness and, furthermore, the only thing that is important so far as the case is concerned is what was done.

The Court: Can't you get right down to the point now and tell the witness what you want to know?

Q. By Mr. Gallagher: Mr. Frederick, did you have any personal knowledge, until after this accident hap-

(Testimony of Adrian Rolland Frederick)

pened, that the shipyard crew was leaving that port bunker hatch open every night when they left the job?

A. I certainly did.

Q. When did you find it out?

A. I saw it every morning when I came to work. The hatch was wide open.

Q. Was it ever roped off?

A. No, sir. It was just as they left it in the after-[434] noon.

Q. Was it ever lighted?

A. No, sir. Just a second. One or two nights they did leave their working light on down in the bottom of that tank.

Q. Was that illuminated at night?

A. The night that I observed it, it was.

Q. It was lighted?

A. It was lighted; yes.

Q. You weren't aboard on Sunday evening, were you, until after this accident happened?

A. No, sir; I wasn't.

Q. When you got aboard, did you observe anybody or any men installing any light or roping off this bunker hatch?

A. Well, I didn't come aboard until 8:00 o'clock Monday morning.

Q. You were not aboard Sunday night at all?

A. No; not at all. Mr. Humble was aboard. Mr. Humble and Mr. Vanover stood the night watches alternately.

Q. Then, you have no personal knowledge of any of the facts surrounding the actual happening of the accident?

A. I haven't, sir.

(Testimony of Adrian Rolland Frederick)

Mr. Gallagher: Take the witness.

Mr. Hon: No questions.

The Court: Did you see the shipyard crew leave after [435] their day's work, the next morning at 3:00 o'clock? A. I did, sir.

The Court: When was the last time they left the work?

A. At 3:30 Saturday afternoon.

The Court: And what was the condition of that opening at that time? Was the lid down or was it open or roped off or what?

A. It was secured to the bulkhead, the forward bulkhead, of the fire room.

Mr. Hon: Does that mean it was open?

Mr. McHose: Yes; I take it —

The Court: It was open?

A. It was wide open.

The Court: It was flush against the bulkhead?

A. Flush against the bulkhead; yes, sir.

The Court: Was it roped off in any way when they left the work?

A. No, sir; it wasn't. And, if I may volunteer —

Mr. McHose: Do you want him to volunteer, your Honor?

The Court: No. I don't want any answers that might be objectionable.

Cross Examination

Q. By Mr. McHose: Mr. Frederick, was the captain on board the ship while you were in the yard?

A. He was; yes, sir; practically every day except — I [436] don't think that he was aboard Saturday but —

(Testimony of Adrian Rolland Frederick)

Q. You virtually kept your entire crew on duty, didn't you, while you were there?

A. I only had a skeleton crew. I had a boatswain and five men, is all.

Q. You had men on duty more or less all the time?

A. Yes, sir.

Q. Were your men doing some work, work that the unions permitted you to do, on the ship while it was in the yard?

A. Yes, sir; we were overhauling and reconditioning the life boats. That was one thing that the union would allow us to do.

Q. Were you doing some ordinary ship's painting and maintenance work?

A. No; just on the lifeboats.

Q. Was some work being done in the engine room?

A. There is another thing that was entirely out of my jurisdiction. That was under the chief engineer. That was under Mr. Schleef's personal jurisdiction.

Q. And you wouldn't know about that?

A. Nothing.

Q. You know what work was being done in the port bunker tank, did you not?

A. I did.

Q. You knew, also, that it was necessary to use the [437] hatch in order to get down into that tank and do the work?

A. Certainly.

Q. And it, also, was necessary to lower any equipment or tools down through that hatch in order to get it down there to work with, wasn't it? A. Yes, sir.

Q. By the way, did you notice how they did that? Did they use a crane?

(Testimony of Adrian Rolland Frederick)

A. No, sir. The only thing they rigged down there was a staging, a plank staging, and all the work was done by the rigging gang of the yard.

Q. All I asked you was how did they get that down in there.

A. They put it down one piece at a time, that is, a plank or a timber.

Q. Did they lower it by block and tackle?

A. They lowered it mostly by hand.

Q. And the work had been going on in that tank for several days before this accident happened, is that correct?

A. Yes, sir.

Q. After the ship came into the yard, the tank still had to be gas freed or work had to be done on it before it was gas freed, isn't that correct?

A. They mucked out the bottom or cleaned out the bot- [438] tom.

Q. You saw workmen doing that, did you not?

A. Yes, sir.

Q. Were you present when these workmen first went down into the tank?

A. I don't recall whether I was or not.

Q. You didn't see anybody actually take that rope down you have spoken about or lift the hatch cover back from the stiff leg, did you?

A. All I know, sir, is that my gang didn't do it.

Q. You were not present when it was done?

A. No, sir.

Q. And you didn't order anybody to do it?

A. No, sir.

Q. And you didn't see who actually did it?

A. No, sir.

(Testimony of Adrian Rolland Frederick)

Q. Did you at any time while the work was going on there see the rope adjacent to the hatch?

A. I certainly did.

Q. Was it there near the hatch or where was it?

A. Well, as I said, one end of it was fast to the bulk-head and the other end of it was laid around the forward end of it. If I remember right, the rope was laid around —

Q. I think you misunderstood me. I am not talking about the way it was when you fixed it up yourself but, while the work was going on in that bunker hatch, did you see the rope any place? [439]

A. Yes, sir; laying on the deck.

Q. That rope belonged to the ship, did it?

A. Yes, sir.

Q. The night that you were there and saw a light down in the port bunker tank, did you happen to notice whether anybody was working down there at that time?

A. Yes, sir; the gang worked until 12:00 o'clock and then knocked off.

Q. They were working a 20-hour day?

A. Yes, sir.

Q. And it would be necessary for them to have a light down there when anybody was working in that compartment?

A. Certainly.

Q. The deck men on board the ship were under your control, that is, you gave them orders as to what they should do and so on?

A. Yes, sir; I gave my orders to the boatswain.

Q. You tell the boatswain what you want done and then he tells the men?

A. Yes. I am not supposed to go to the men. The boatswain doesn't like that.

(Testimony of Adrian Rolland Frederick)

Mr. McHose: That is all.

Mr. Hon: No questions. I will stipulate the witness may be excused.

Mr. Gallagher: That is all. May he be excused, your Honor? [440]

The Court: Just a moment. I don't know that I want to ask this witness about it but what do the rules provide about a situation of that kind, as to it being left open? I mean after the crew went away.

Mr. Hon: I think that is a question of fact for your Honor to decide.

Mr. McHose: Your Honor, there is no specific rule about such a thing as that.

The Court: What I have in mind is this. This witness states he saw this opening when these men left their work and, apparently, that remained open and there was no rope or no safeguard around that opening. I would like to know this. Was there a duty upon some member of the crew to see to it that that particular spot was safeguarded in some way?

Mr. McHose: I think Mr. Hon is right that this is a question for your Honor.

Mr. Hon: Your Honor, I contend this. I think that you, sitting as a Judge, may determine that by what an ordinarily reasonably prudent person, under the same or similar circumstances, would have done. I think that will be covered as a factual situation that we will have to cover in argument. That was one of my theories in suing both parties.

Mr. Gallagher: I will ask him the question.

Q. Mr. Frederick, why didn't you follow the shipyard crew around every night when they got through and take

(Testimony of Adrian Rolland Frederick)

charge [441] of that bunker hatch and put ropes around it or do something about it?

Mr. Hon: To which we object, your Honor. Every night wouldn't have anything to do with this case. He should confine it to the night of August 5th. Secondly, I think that is an attempt to invade the province of the fact-finding tribunal.

The Court: Was it anyone's duty, connected with the ship, or any other concern, having to do with this boat, to have that particular opening closed when it wasn't in use by the repairmen?

Mr. McHose: That, your Honor, is purely a question of fact for you to decide. There is no regulation that specifically states that to my knowledge.

Mr. Hon: That is where the law of negligence comes in. You will base that on what reasonably prudent persons would have done under the same or similar circumstances and apply it to both respondents alike.

The Court: I will sustain the objection.

Q. By Mr. Gallagher: Mr. Frederick, while work is being done on a ship in a shipyard, is it one of your duties to safeguard the parts of the ship where the shipyard is working?

Mr. McHose: I don't think that is a proper question, either. It is, obviously, his duty to safeguard any part of the ship, if he knows anything. [442]

Mr. Gallagher: That might be so and it might not. I guess I can't ask you why you didn't do it.

The Court: He had been ashore on the Sunday.

Q. By Mr. Gallagher: Were you there on Saturday?

A. I was; yes, sir; from 8:00 a. m. until 3:30 p. m.

Q. And you saw the shipyard people leave?

A. I did. The fact is I followed them off.

(Testimony of Adrian Rolland Frederick)

Q. And, at the time they left, did you see this bunker hatch open?

Mr. Hon: That has been asked and answered, your Honor, and I object to it.

A. I make it a habit while I am on board a ship to be on deck at all times when I am on duty, and I must have seen that hatch several times during that day and, when I did, there was always some of the yard men working around it or in it. As they had charge of that hatch, I didn't consider it my duty in any way, manner or form, to interfere in any way and I left it up to them entirely. I left it up to them to leave the hatch the way they found it, or I supposed they would anyway.

Mr. Hon: May I ask a question?

Cross Examination

Q. By Mr. Hon: Mr. Frederick, you knew, sir, as chief mate, that members of the United States Coast Guard would at different intervals inspect that ship, didn't you, sir? [443] A. Yes; I did.

Q. And you knew that they would inspect it night time as well as day time, didn't you? A. I did.

Q. You knew that, in inspecting that ship, they were likely to go over any portion of the ship, isn't that right?

A. I never followed them around. I don't know where they went. I will tell you I knew they came aboard and they had a paper for me to sign and I signed the paper and I answered their questions specifically, and signed the paper as the chief officer of the ship.

Q. If you were not in sight, they would look for you until they found you? A. Yes, sir.

(Testimony of Adrian Rolland Frederick)

Mr. Hon: That is all. I will stipulate this witness may be excused.

Mr. McHose: I think I will ask one more question.

Cross Examination (Resumed)

Q. By Mr. McHose: Do I understand that you felt with respect to any work that the shipyard was doing that you wouldn't — if the shipyard quit work and left the ship in some condition of danger — that you would do nothing about it?

A. No, sir. I considered my duties as a mate — or a part of the duties of a mate on board a ship is to see that there is no fire hazard and that the ship is secured and that [444] all fire-fighting equipment is ready for instant use, and that is what I did.

Q. Your duty also to the owners of that vessel would be to see that no condition was permitted to exist which would endanger the safety of the ship, isn't that true?

A. Yes, sir; that is true.

Mr. McHose: I think that is all.

Mr. Hon: That is all.

The Court: Are there any further questions?

Mr. Hon: No further questions.

Mr. Gallagher: That last question was a little ambiguous, I think.

Redirect Examination

Q. By Mr. Gallagher: When you talk about safety of a ship, you mean the ship itself?

A. The ship itself; yes, sir.

Q. Not whether the ship is safe for Coast Guardsmen but whether the ship itself is in danger?

A. That is what I mean to say.

(Testimony of Adrian Rolland Frederick)

Mr. Gallagher: That is all.

Mr. McHose: I would like to ask another question.

Recross Examination

Q. By Mr. McHose: Let's assume, Mr. Frederick, that the shipyard had been working on the ship and they had taken away a long section of railing alongside of the ship and they [445] had failed to put up any chain or any rope or anything along there, so that the side of the ship was open and anybody walking across it would fall down into that place, and you came on board the ship and found that condition was there. Would your testimony be that you would do nothing about it?

A. I wouldn't do anything about it if the yard crew was doing work there or near it or coming back. As to this hatch, I didn't know whether they were coming back at 12:00 o'clock at night, 8:00 o'clock or any other time. All I knew was they had knocked off and left the hatch open and I assumed they were coming back to work that night.

Q. Were you on the ship on Sunday?

A. No, sir.

Q. The next time you came back to the ship was Monday morning?

A. Yes, sir.

Q. And, while you were not on the ship, other ship's officers were on board?

A. Yes, sir.

Mr. McHose: That is all.

Mr. Gallagher: May the witness be excused?

The Court: You are excused.

Mr. McHose: May I ask whether your Honor expects us to argue the matter or brief it or what is your pleasure in that respect? [446]

Mr. Hon: I certainly don't think we ought to brief it. I don't think there is anything to brief.

Mr. McHose: I wouldn't go along with that. I am perfectly satisfied to either brief it or argue it, which ever you prefer. There are some questions of law.

The Court: There are questions of law but, yet, the issues are not very complicated; I mean the factual issues. The question is whether there is negligence on the part of either or both respondents.

Mr. McHose: I think we can certainly argue the factual matters.

The Court: We will see what will happen after you finish your evidence.

(Thereupon, a recess was taken until 10:00 o'clock a. m., Friday, February 14, 1947.) [447]

Los Angeles, California, Friday, February 14, 1947, 10:00 a. m.

(Same appearances.)

Mr. Gallagher: Captain Bengston, come forward, please.

OSCAR BENGSTON,

a witness for the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Oscar Bengston.

Direct Examination

Q. By Mr. Gallagher: Where do you live, Captain?

A. San Francisco.

Q. What is your occupation?

A. Master mariner.

Q. In 1944, were you the master of the Frank G. Drum?

A. Yes, sir.

(Testimony of Oscar Bengston)

Q. And were you in charge of the vessel when it was brought into the Bethlehem Steel Company shipyard at San Pedro? A. Yes, sir.

Q. While the vessel was at sea, was any work done in the port bunker tank?

A. It was cleaned out, washed out.

Q. And, after it was cleaned out, how was it rigged or left? [448]

A. The tank lid was left on its support, which left the tank lid at about a 45-degree angle, and there was some rope stretched around it also.

Q. Was that the condition of that bunker tank and the hatch when that ship was brought into the shipyard?

A. Yes, sir.

Q. Did it remain in that condition up until the time the shipyard workers commenced working on it?

A. Yes, sir.

Q. Captain, you were not on board at the time this accident happened, were you? A. No.

Q. Can you tell us where the fire extinguishers were on that vessel?

A. Well, there was some under the forecastle head and some in the 'midships house part and some in the passageway, on the poop deck and engine room and fire room.

Q. Were there any portable fire extinguishers of any kind at any place where they would be exposed to the weather? A. Not belonging to the ship.

Q. Do you know where the fire hydrants were located on the main deck? A. Yes, sir.

Q. Where was the fire hydrant which was closest to the forward bulkhead of the after house? [449]

A. Which one of them?

(Testimony of Oscar Bengston)

Q. The closest to the bulkhead. How far away was it?

A. About 10 feet forward of the pump room.

Q. Captain, was there ever any canvas flap or cloth flap or any kind of a flap in place at either the forward end of the starboard passageway of the main deck or the forward end of the port passageway of the main deck on that vessel? A. No.

Q. How far from the doors at the forward end of those passageways was the nearest light inside of the passageway? A. About 15 feet.

Q. And had anything been done to those lights?

A. There was a metal shield on the forepart of the light so it would not show on deck.

Q. Captain, were there any flashlights aboard that vessel which people could get and use if they wanted to?

Mr. Hon: Just a minute. I object to that as being incompetent, irrelevant and immaterial. It has no connection with any issue in this case.

The Court: Sustained.

Q. By Mr. Gallagher: Will you tell us whether that vessel was under charter at the time it was in the yard?

A. It was on charter to W.S.A.

Q. That was a time charter? [450]

A. Yes.

Mr. Hon: I would think the charter would be the best evidence.

The Court: The charter is in evidence, isn't it?

Mr. Gallagher: I offered it but your Honor, I think, acceded to Mr. Hon's suggestion that it wasn't the time for me to do it. I have got it here now and I will offer it.

(Testimony of Oscar Bengston)

Mr. McHose: I object to it, if the court please. I don't care about its going in and I think it is completely irrelevant and immaterial. It has nothing to do with this case. The ship was under time charter to the War Shipping Administration. Now, your Honor probably is familiar with a time charter. That means that the War Shipping Administration simply had the right to tell that ship where it was going to go and what cargoes it would carry and things of that sort. But the ship was under the operation and control and management of the Associated Oil Company, and I don't think it can be said here that the War Shipping Administration has any responsibility in this case, and, unless it has, I don't see what is accomplished by introducing the charter party.

Mr. Hon: Your Honor, I am going to join in that statement of Mr. McHose's for this reason and another reason; that the undisputed evidence shows that the Tide Water, the respondent Tide Water Oil Company, employed Bethlehem to do the work on the hatch. Now, the only — [451]

Mr. McHose: Mr. Hon, there was no work being done on the hatch.

Mr. Hon: Well, at that particular place.

Mr. McHose: I think the evidence is very clear there was no work being done on the hatch.

Mr. Hon: That was the work, as I understand it, that was being done for Tide Water, down through the hatch. Is that true?

Mr. McHose: I don't like to have you say "through the hatch."

The Court: In the evidence that was introduced as to the work, that hatch opening was used for the purpose

(Testimony of Oscar Bengston)

of getting material down there to do the work in regard to the plates on the outside of the vessel, as I understand. Now, go ahead with your objection.

Mr. Hon: As I understand it, that particular work, where they had to use the hatch — that that was opened for the purpose of doing the work for Tide Water Oil Company. The work Tide Water employed Bethlehem to do was a work that was at or near the bunker hatch, where they had to use the bunker hatch to get to and from that.

The Court: That is the evidence. But what is your objection?

Mr. Hon: I don't see where the time charter would have any bearing on the issue unless it showed that the government [452] was having that particular work done.

The Court: What is the importance of that?

Mr. Gallagher: The importance of it, if your Honor please, is simply this. The libelant contends that he was an invitee by Tide Water Oil Company. That is the allegation in his libel. We deny that. The time charter is material at least for the purpose of showing that the United States Government, through the War Shipping Administration, was the entity which had the right to permit people to come aboard or to keep them off, and that the Tide Water Associated Oil Company had no right whatever to refuse admittance to anyone who was brought there or sent there by the charterer.

In other words, I take it to be the case that it is similar to running a home with a cook and a housekeeper, as I told your Honor the other day. The people who come into the house are not the guests of the owner of the home or the employer of the cook and housekeeper. They

(Testimony of Oscar Bengston)

are the guests of the person who rents the place and has the right to use it. The government had a right to come aboard and put anybody aboard it wanted to, but that wouldn't make the persons who came aboard invitees of the Tide Water Associated Oil Company.

The Court: The government wasn't directing the vessel at that particular time, no matter how many charters there were. [453]

Mr. Gallagher: The government controlled who could go aboard and who couldn't go aboard.

The Court: But there is nothing in the evidence to show that they exercised, under the time charter, that right.

Mr. Gallagher: They sent this man aboard.

The Court: But this is a merchant vessel owned by Tide Water and the work was ordered by Tide Water and the work was done by Bethlehem Steel Company. There is no evidence whatsoever that the United States Government directed the movements in any particular of that particular vessel at that particular time. Is there?

Mr. Gallagher: I am trying to introduce the evidence with respect to the time charter. I can't see how Tide Water Associated Oil Company had any power to keep this young man off of that vessel. And, if it had no power to keep him off, how could he be an invitee? He didn't come there at their invitation.

Mr. McHose: I think the fallacy of that is this, that this man did not come aboard as an employee of the time charterer. This man came aboard as the employee of the Coast Guard, another agency of the government, but not in any sense coming on board in connection with the time charterer. And I can submit authorities to your Honor,

(Testimony of Oscar Bengston)

if you wish them, although I think your Honor is ruling with us anyway, that the time charterer doesn't have any responsibility as far as [454] the responsibility of taking care of a ship which is in the possession and control of the owner, and merely time chartered to somebody for the purpose of carrying cargoes and going where that time charterer wants the ship to go, under the command of a captain employed here by the owner and with a crew employed by the owner, and in a situation where this ship was at the time this happened.

The Court: Furthermore, all of these employees of the vessel testified they received their pay, or at least some of them did, from the Oil Company, and that some of them were employed by the Oil Company for many years.

Mr. Gallagher: In the example that I gave to your Honor of the owner of a home, let's suppose your Honor wanted to rent your home and you agreed to furnish a cook and a housekeeper as part of the service and to pay them. You would still be paying them. They would be your employees. But the people who came into the house wouldn't be your invitees.

The Court: Maybe I don't understand the full legal effect of this charter. Does the United States merely have the first call on the movement of the boat?

Mr. Gallagher: It is a lease of the vessel, with the owner furnishing the crew. The charterer can use it for his own purposes. He can have parties on board the boat if he wants to and do what he chooses to do with it except to run it into the rocks. [455]

Mr. McHose: It might be helpful to the court, if you do not already understand, that there are two types com-

(Testimony of Oscar Bengston)

monly used of charters in connection with ships. One is a time charter. For instance, I own a ship and Mr. Gallagher wants to have a cargo taken to Europe and he makes a time charter of my ship, and I provide that ship. I have my own captain and my own crew and I provide the food and the fuel. I take my ship alongside of his dock and he loads his cargo in the ship and my captain still is in command of the ship and he takes the ship over to Europe and delivers the cargo.

The other kind of a charter is a bare boat charter. But we have only a time charter and the Associated Oil Company never gave over the responsibility for the control and operation of that ship to the United States Government. And, therefore, I think we are wasting time if we put in a charter party which, when your Honor reads it, you will find has no possible bearing on the issues here.

The Court: Let's see that. It should be marked for identification.

The Clerk: I will mark it respondent Tide Water's Exhibit H for identification.

Mr. Gallagher: I assume your Honor sustains the objection to the offer?

The Court: I would like to read and see just the effect of this instrument, or at least parts of it. It is a [456] long document. I am just wondering if you gentlemen, who are well versed in these matters, can point out to me the salient portions of this respecting the use of the ship. I notice the first clause is that "The vessel shall be placed at the disposal of the charterer at the port of delivery at such safe ready dock, wharf or place as the charterer may direct." That is the purpose, isn't it, of a time charter?

(Testimony of Oscar Bengston)

Mr. Gallagher: Yes, your Honor.

The Court: Does that tell the whole story?

Mr. McHose: He can tell where he wants the ship to go and things of that sort but the charterer never takes over the possession of that ship. It is always in charge of the master or the owner.

If the court please, I can cite you a case, "The Spokane," which is 494 Fed. 242, which specifically held that the owner of a vessel could not relieve himself from responsibility by delegating it to the time charterer. In that case there was a time charter and an employee of a construction company, which was making repairs on the ship, was injured when he slipped on a greasy deck, and the shipowner was held liable and the time charterer, who was impleaded by the shipowner under the 56th Admiralty Rule, was held not liable.

And another case, in which I think that same point arose, is in 266 Fed. 200. [457]

Here is what the court said in the Spokane case, "When the vessel contracted with the construction corporation for the repairs, it assumed the obligation to keep all parts of the ship under its control reasonably safe for the employees of the construction corporation. It could not relieve itself of this duty by delegating it to the time charterer."

Mr. Hon: As I understand, Mr. McHose, isn't it true that, under a time charter, the owner of the boat retains all of his own employees and his own employees operate the boat, and the only thing that the person chartering the boat gets is just the services of these people?

Mr. McHose: The service of the ship.

(Testimony of Oscar Bengston)

Mr. Hon: But, if a bare boat charter was made, the owner would keep everything, is that right?

Mr. McHose: It is like when you go into a hotel room. You get the service and, if anything happens in that room, you are not responsible for it.

Mr. Hon: In other words, a time charter is a vessel that is placed at the disposal of a party and, if used under that charter, then the user will pay the stipulated cost?

Mr. McHose: That is right. And the owner is required, among other things, to keep the vessel in repair. That is why the ship was in the yard. The testimony is quite clear that the contract for repairs was with the Associated Oil Company and the bills were to go to the Associated Oil Company. [458]

The Court: There is nothing in the record to show that the United States Government or the War Shipping Board was directing or exercising any control over this particular vessel at the time. On the contrary, the proof thus far negatives any control other than that which has been testified to. The situation might be different had this vessel at that particular time been subject to the control as stated in the charter, that is to say, at that particular time. There is some evidence here that the United States Government had ordered the use of the vessel at that time.

Mr. Gallagher: Your Honor will recall the evidence that the War Shipping Administration ordered some of this work, not on this port bunker tank, but there was some work being done while the vessel was there in that yard, ordered by the charterer, the War Shipping Administration.

(Testimony of Oscar Bengston)

The Court: I think that is true. We didn't go into that and I don't know what that was. There was some correspondence there as to an additional order, in addition to the one given by the Oil Company, for some additional work.

Mr. McHose: Your Honor, I can explain that. We didn't go into details on that because it didn't seem material. But what was actually happening was this. The War Shipping Administration was about to take over this ship under a bare boat charter. They had had it under time charter and the time charter was being terminated and, under the government practice, [459] which I happen to be familiar with, the War Shipping Administration would terminate the time charter and redeliver the ship under the time charter and then take it over under a bare boat charter, at which time the War Shipping Administration would provide the crew and take over full responsibility for the ship. That was going to be done and the ship was then going to be turned over to the United States Navy after the repairs had been completed. But, before that would be done in this case here, the War Shipping Administration required the owners to make these repairs. These were annual repairs which the owner had to make. And what actually did happen, as I understand it, was that, after these repairs were completed, the War Shipping Administration did take over the ship under a bare boat charter, but the accident happened before that had occurred and while the time charter was still in effect.

The Court: I didn't understand that any of the work that was done in this hatch or in this bunker had anything to do with any other work ordered by the Tide Water Oil Company, so far as securing plates.

(Testimony of Oscar Bengston)

Mr. McHose: Take Mr. Courtiour's testimony and Mr. Harrington's testimony and it is to that effect.

The Court: The offer is denied.

Mr. Gallagher: Your Honor, if it is necessary to save an exception, I, respectfully, take one. [460]

The Court: It may be noted.

Q. By Mr. Gallagher: Captain, how long was that vessel withdrawn from navigation in 1944?

Mr. McHose: What do you mean by "withdrawn from navigation"?

Q. By Mr. Gallagher: While it was in the shipyard being repaired, it wasn't being navigated?

A. It wasn't possible to navigate it.

Mr. McHose: Do you mean how long was it up in the shipyard?

Q. By Mr. Gallagher: How long was it in the shipyard, without any power, without its machinery in operation?

A. Between three and four weeks.

Mr. Gallagher: That is all.

Cross Examination

Q. By Mr. Hon. Just one question, Captain. This accident happened between 9:00 and 9:30 p. m. on August 6, 1944. That was a Sunday night. When was the last time you were on the boat prior to that time?

A. As near as I remember, it was the day before.

Q. The day before? A. Yes.

Q. And that would have been say about 30 hours or better before that, is that right? Well, it was in the daytime, on Saturday — [461]

A. Yes, sir; about that.

Mr. Hon: That is all.

(Testimony of Oscar Bengston)

Cross Examination

Q. By Mr. McHose: Captain, Mr. Gallagher asked you a question about flashlights, to which the court sustained an objection. If Mr. Richardson, a member of the Coast Guard, had gone to one of the ship's officers and requested a flashlight to make an inspection of the ship, were flashlights available that might have been furnished him?

Mr. Hon: I object to that as highly speculative. It calls for a conclusion of the witness and is calling for testimony not within the issues of the case and calls for something that wouldn't be binding upon the libelant in this case. And there must be some foundation laid showing there was some duty upon Richardson in that respect.

Mr. McHose: If your Honor please, we have here a question of negligence. It is our prime conviction that Mr. Richardson was negligent in this case. If he had had a flashlight in his hand and had not used it, I would think the court would say that was a very definite negligent act. If there were flashlights on board the ship which he could have obtained to make an inspection, and he could merely go to the mate and ask for one, and if there were flashlights available on the ship, I think that is a matter that is important to the court in deciding whether Richardson was negligent. I think [462] it is quite material evidence. That is not speculative and it is not calling for a conclusion. The Captain will either know or not know whether there were flashlights available and we think it is proper evidence and should be admitted.

The Court: I think it is speculative, whether flashlights and illumination were available. Do you want to

(Testimony of Oscar Bengston)

go into that? I think the court has to take into consideration only those things that did happen.

Mr. McHose: Yes but, if Mr. Richardson had done what he should have done, this accident never would have happened.

The Court: That is a matter of argument.

Mr. McHose: It is also important to the court to know whether there were facilities available to him and I want to bring out whether those facilities were on that ship and available.

Mr. Hon: You would have to show that he had that knowledge.

Mr. McHose: Anybody, with any grain of sense, who boards a ship, knows that flashlights were available.

Mr. Hon: He had enough sense to get in the Coast Guard.

The Court: The fact that he didn't have or use a flashlight we know to be a fact.

Mr. McHose: That is right.

The Court: He didn't use anything and it is for the court to determine whether or not that situation constituted [463] any degree of negligence on the part of Richardson, and that is a matter for the court to determine.

Mr. McHose: That is right and, also, the court could determine, as a part of that, whether there were other flashlights available which he could have gotten.

The Court: That is speculative. The objection is sustained.

Q. By Mr. McHose: Captain, the bunker hatch had to be open in order for work to be done down in the bunker tank, did it not? A. Yes, sir.

(Testimony of Oscar Bengston)

Q. And, after it had been opened and the tank had been gas freed, it had to remain open for ventilation purposes, is that correct? A. Yes.

Q. Now, as a matter of fact, was the whole ship gas freed, Captain? A. Yes.

Q. All your tanks had to be certificated as free of gas before you could do work in the shipyards?

A. Yes, sir.

Q. And that was done on this occasion? A. Yes.

Q. Are there quite a number of hatches leading into tanks similar to this hatch here on the deck of this ship? [464]

A. Yes; there is 28 cargo hatches similar to that.

Q. Substantially one at every hatch?

A. That is right.

Q. Captain, were you familiar with the port security regulations of the United States Coast Guard, that were in effect at the time this accident happened?

A. Yes, sir.

Q. Did you provide the guards that were called for by those regulations, while the ship was in the shipyard?

Mr. Gallagher: That is objected to, your Honor, upon the ground it is immaterial. Those guards are required for the purpose of safeguarding the ship, and whether they were there or not wouldn't have any proximate causal connection with any injuries sustained by Mr. Richardson.

Mr. McHose: That is a matter of argument, your Honor. The regulations of tank vessels, which have already been placed in evidence, show what the purposes are.

The Court: Will you read the regulation?

(Testimony of Oscar Bengston)

Mr. McHose: "While alongside docks, tankships will maintain armed guards at all times as follows: The armed guards may be of the crew or of an approved organization from ashore." And then it goes into patrol. There is one guard to patrol the vessel's offshore side and it specifies his duties, an armed guard keeping the ship's gangway in view and a roving guard to patrol through the vessel. And [465] there is provision here as to what equipment the guards shall have and there is a provision which says, "Guards on tankships will be instructed as to their duties. They will be limited to men of satisfactory vision, hearing and vigor. They will be responsible to resourcefully safeguard the premises from jeopardies that become apparent, though not ordered in their specific task. One of the guards on duty shall be designated as the chief guard."

I also read to your Honor from Title 33 of the Code of Federal Regulations. These are the regulations promulgated nationally, as distinguished from the tank vessel regulations promulgated locally, and these rules go into detail as to what guards shall be on board ships and what guards shall be on board ships at certain times and with respect to roving guards. It states what equipment they shall have. It says this, "All guards, other than those of the Military and Naval forces of the United States, shall, when on duty, have the following equipment:

"(a) A copy of the regulations contained in this subpart, a Coast Guard identification card endorsed 'Guard' by the captain-of-the-port, a badge or other insignia, a flashlight, a police club and a police whistle."

And it goes into details as to what the duties of the roving guard are, and, among other things, it states this, "Duties of Roving Guard: [466]

(Testimony of Oscar Bengston)

“(1) To patrol continuously from one end of the ship to the other or, within the confines of the area prescribed by the chief guard, and to observe on these rounds the security of accessible spaces for the detection of fire, disorder, violation of security regulations and the presence of unauthorized persons.”

It also contains other things. And I read, specifically, paragraph 5, “To inspect spaces in which workmen are engaged or from which they have recently departed.”

And I think it is proper to ask the captain of this ship whether those guards called for by law were provided.

The Court: The question is whether they were employed?

Mr. McHose: I didn't read one other thing which I should have, your Honor. This, specifically, says that these guards shall be provided by the master. Section 6.332 reads, “The master, vessel owner, operator, and agent shall provide all guards required by the regulations contained in this sub-part except where such guards are provided by military authority.” [466a]

The Court: What rules are those that you read from?

Mr. McHose: They are from the Code of Federal Regulations, what are called Port Security Regulations, issued by the United States Coast Guard, under authority of the Secretary of the Navy, who, in turn, acted under the authority of the President of the United States, under the War Powers Act.

The Court: And these have the force of law?

Mr. McHose: They have the force of law. They were in effect during the war and they have now gone out of effect.

(Testimony of Oscar Bengston)

The Court: And during this particular time?

Mr. McHose: And at this particular time.

The Court: Do you concede that to be a fact?

Mr. Gallagher: These are the same regulations which we discussed the other day, and I called to your Honor's attention respondent Tide Water's contention that these regulations do not provide any standard of check which is acceptable in a civil action for damages. And these guards are not required for the purpose of doing anything excepting to see that they don't steal the ship or burn it up or cut it loose, and there isn't anything in here which refers to a situation like we have in the case at bar, where a ship is in a shipyard. These security regulations are, obviously, for the purpose of protecting the ship while it is moored at an ordinary dock and either taking on cargo or discharging cargo or getting ready to sail some place. [467]

Mr. McHose: That isn't the objection. The regulations are applicable to all vessels and they so provide. I will give you the exact citation of this.

The Court: I think we ought to have it in the record.

Mr. McHose: It is found in the Code of Federal Regulations of the United States Government, Cumulative Supplement, Titles 33 to 45. It is a part of Title 33, "Navigation in Navigable Waters," which is sub-part E. The security regulations for vessels in port, page 9594, I have read to your Honor; I mean all of the pertinent portions. Section 6.322 is the Manning of Vessels in Port and that covers the requirements of vessels both in service and out of service. The subsequent section is the guarding of vessels, Section 6.330, on page 9596, and the duties of guards is found in Section 6.337, on

(Testimony of Oscar Bengston)

page 9597, and the duties of roving guards, which I read to you, is found on page 9598. There are quite a number of regulations. And these regulations were printed in the form of pamphlets which were distributed, and the little pamphlet which I showed to the officer yesterday is a copy of these regulations.

The Court: Is that pamphlet in evidence now?

Mr. McHose: No; I don't think it is necessary to put it in because it is a matter of law, your Honor. These are laws of the United States.

The Court: And you have quoted from the sections in full, [468] have you?

Mr. McHose: I have quoted from pertinent sections. This document of regulations for tank vessels, which was introduced in evidence as Libellant's Exhibit 6, is a local thing which was prepared by the local Coast Guard people and is supplemental, as I understand it, as Admiral Higbee testified. This document, Section 34, provides substantially the same thing that I read here. "Tankships temporarily unmanned and immobilized for extensive repairs. The master, owners, agents, and other responsible persons will safeguard tankships in such status by all practicable means. Unless otherwise required by the Captain of the Port, there will at all times be one licensed officer on board. In addition, the three guards required by Paragraph 6 will at all times be actively on duty for every tankship of more than 3,000 gross tons." [469]

That is merely a restatement of what is in the Federal Regulations.

The Court: The question that was asked is what? I have lost track of it.

(Testimony of Oscar Bengston)

Mr. McHose: I, first, asked the Captain whether he was familiar with the Port Security Regulations and whether such guards were employed.

The Court: And there was an objection to that question?

Mr. Gallagher: Yes, your Honor.

The Court: You may answer.

Mr. Gallagher: We will take an exception.

A. The regulations were observed.

Q. By Mr. McHose: And the guards were employed?

A. Yes, sir.

The Court: Do you still object to the question?

Mr. Gallagher: Yes, your Honor, because I don't think the presence or absence of guards is of any materiality or would furnish any basis whatever of civil liability. They were not promulgated for that purpose. I think Congress is the only body which could enact any law which would set up a standard of conduct which must be observed and which would furnish a basis of civil liability.

Mr. McHose: If the Court please, Congress has acted. Congress passed the War Powers Act and empowered the President to make regulations, and that is just what was done. [470]

Mr. Gallagher: Suppose the President had issued an ukase saying that all shipowners in the United States shall be liable for injury which is sustained by any person who comes aboard such vessel, whether the shipowner is negligent or not. I don't think there is anybody in the courtroom who would contend that the President of the United States would have the slightest au-

(Testimony of Oscar Bengston)

thority to issue any such edict, whether it is in time of war or time of peace. That is the particular point which I am trying to convey to your Honor.

The Court: It would bear on the question of negligence the same as the law, for example, that says that a man shall not exceed 50 miles in speed, and, if he does, that certainly is significant in a civil damage action. And it also would apply in a criminal prosecution in that particular instance. I don't see the difference. Here there is a regulation regulating the conduct in the operation of vessels, and, if there is any non-compliance, it would seem to me that a violation would have some bearing in a civil or a criminal action, either one.

Mr. Gallagher: Well, of course, your Honor is familiar with the rule that a criminal suit is not per se a basis of civil liability. The civil liability is predicated either upon the general maritime law or statutes adopted by Congress and these regulations — well, I have already pointed out to your Honor what our contentions are. I think there are a good [471] many authorities which can be called to your Honor's attention and which I will call to your Honor's attention.

The Court: May I interrupt you? I am going to call a recess for a few moments for a matter that is coming up.

(Short recess.)

The Court: You were about to conclude your objection.

Mr. Gallagher: I think I was merely going to refer to the fact that I had already outlined the position I took with reference to these regulations in re guards, and the only thing I could add to it would perhaps be to brief it for the court.

(Testimony of Oscar Bengston)

The Court: I think I have already ruled on it, and the ruling will stand.

Q. By Mr. McHose: I have two other questions, Captain. In order to do the work in the tank — or perhaps I did ask you this question. It was necessary to have the bunker hatch open, wasn't it? In order to do the work down in the bunker tank and get the equipment down there to do it with, it would be necessary to open the hatch, would it not?

A. Yes, sir.

Q. So it would have to be open for that purpose as well as for ventilation?

A. Yes, sir.

Q. You don't know yourself who removed the rods out of that bunker hatch, do you? [472]

A. No.

Q. You didn't see that done?

A. No; I didn't see it.

Mr. McHose: That is all.

Mr. Hon: No questions.

Mr. Gallagher: The respondent rests.

Mr. McHose: We rest.

Mr. Hon: No rebuttal.

Mr. Gallagher: May the Captain be excused, your Honor?

The Court: Yes; he may be excused.

The Court: Are there any unfinished offers or any pending matter that hasn't been ruled on?

Mr. McHose: I don't think of any.

Mr. Hon: I don't think so, your Honor.

The Clerk: Do you want to sign this?

Mr. Hon: Yes. This is the amendment to the libel that we stipulated yesterday could be filed.

The Court: Would you gentlemen like to demonstrate the course that he took from this particular point?

Mr. McHose: Yes.

Mr. Gallagher: I would like to have the court take a look at the inside of this port passageway for the purpose of pointing out any hooks or holes.

The Court: Is it possible to open this hatch cover?

Mr. Gallagher: No, your Honor.

Mr. Hon: I also want the record to show that, at about 25 or 30 feet aft of the port exit in question, there is another fire hose attached to the starboard side of the passageway.

The Court: Is it satisfactory that one of you demonstrate the steps that he is alleged to have taken at this particular point, before he fell in at the opening?

Mr. McHose: That is all right as far as I am concerned.

Mr. Hon: Yes. [476]

Mr. Gallagher: All we could do would be to demonstrate our contentions.

Mr. McHose: Mr. Hon can demonstrate for the libelant and you for the respondent.

Mr. Gallagher: Mr. Hon and Mr. Feintech have demonstrated, when each of the proctors for the libelant came out of the passageway, that he crossed his left leg over so that he actually stepped with his left foot to the right of the place where his right foot was on the inside.

The Court: I didn't observe that closely. So, will one of you gentlemen make that demonstration?

Mr. Hon: Yes.

The Court: Demonstration made by Mr. Feintech by taking a step over the coaming with his left foot and then bringing over the right.

Mr. McHose: I think we might mention that Mr. Feintech is considerably larger than Mr. Richardson.

Mr. Hon: Then, I will do it.

The Court: Now, you gentlemen can demonstrate if you want to.

Mr. Gallagher: Isn't the Judge about the same height as Richardson?

Mr. Hon: Yes.

Mr. Gallagher: I think your Honor could make the step.

Mr. Feintech: In bringing my left foot out, it was neces- [477] sary for me to step over a coaming that was about 20 inches high; and, likewise, in bringing my right foot out, my foot was lifted over the coaming that was 20 inches in height.

Mr. Gallagher: And stretching the right foot in order to get it inside of the hatch coaming.

Mr. McHose: I think we should mention these other obstructions; that, if he had taken another step, he would have bumped into this valve.

The Court: Let's see Mr. Gallagher make the demonstration.

Mr. Gallagher: You try it and, if you don't make an effort to put your foot over there—you have to make a long step, a long goose step.

Mr. Hon: How high is this?

Mr. Gallagher: About 18 inches.

Mr. Hon: It is higher than that.

The Court: It is about two feet.

Mr. Hon: I have to raise my foot at least two feet and that is not a long step. You have a 30-inch stride in the Army and that clears it by eight inches.

The Court: I have seen it.

Mr. McHose: Mr. Gallagher, we also probably should point out the surroundings here to the Judge. There are no fire extinguishers here now.

Mr. Hon: And, also, let's point out that you can easily go [478] over here without going on the catwalk. Of course, if you open this up—I can't do it.

Mr. Gallagher: Close your eyes and go across there, so it will be dark.

The Court: This is not an exact demonstration. Will you open one of these hatches so I can see in it? I want to see down in the hatch. When this is open, where are the stanchions?

Mr. Gallagher: Here are the stanchions.

Mr. McHose: There is no evidence in this case there were any stanchions.

Mr. Gallagher: Will you stipulate that the longitudinal member closest to the port side of the bunker hatch is about eight inches from the port side of the bunker hatch?

The Court: About how wide is it, the member?

Mr. Gallagher: It is about three inches wide, that is, the top surface.

The Court: I think that is all. Thank you. Let the record show that the matter is now submitted.

[Endorsed]: Filed Oct. 8, 1947. [479]

[Endorsed]: No. 11757. United States Circuit Court of Appeals for the Ninth Circuit. Tide Water Associated Oil Company, a corporation, Appellant, vs. David Lawton Richardson and Bethlehem Steel Corporation, a corporation, Appellees. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 14, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11757

TIDE WATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and
BETHLEHEM STEEL COMPANY, a corporation,
Appelles.

STATEMENT OF POINTS ON WHICH APPEL-
LANT INTENDS TO RELY ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERATION
THEREOF

Appellant adopts as its points on appeal the Assignments of Error appearing in the transcript of the record in this case.

Appellant requests that the record as certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be printed in its entirety.

Dated: October 17th, 1947.

LASHER B. GALLAGHER
Proctor for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 20, 1947. Paul P. O'Brien,
Clerk.

No. 11757
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,
Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL
COMPANY, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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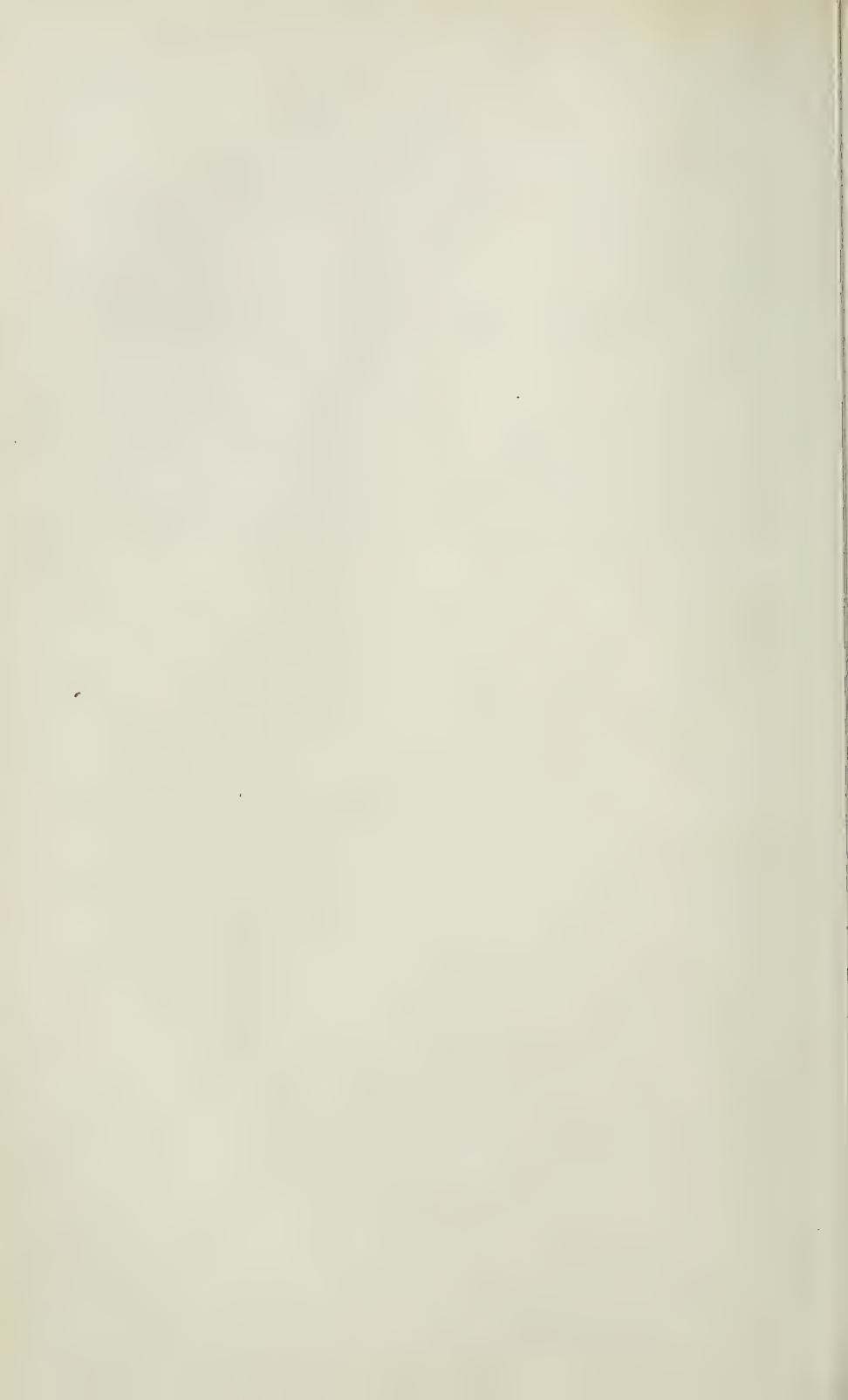
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No. 11757
IN THE
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TIDE WATER ASSOCIATED OIL COMPANY, a corporation,
Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL
COMPANY, a corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal in admiralty from a final decree entered by the United States District Court, for the Southern District of California, Central Division, in an action for damages by reason of personal injuries sustained by the appellee Richardson when he fell into an open port bunker hatch on a vessel then resting in navigable waters of the outer harbor at Terminal Island or San Pedro, California.

Final Decree was entered on August 30, 1947. [Ap. 90.]

Assignments of Error were filed September 8, 1947. [Ap. 91-107.]

Petition for Appeal was filed and allowed September 8, 1947. [Ap. 108-110.]

Notice of Appeal was served on September 8, 1947 and filed September 10, 1947. [Ap. 111.]

Bond on Appeal was filed and approved on September 8, 1947. [Ap. 113-114.]

Notice of Filing Bond was served and filed September 10, 1947. [Ap. 117.]

Jurisdiction of civil causes of admiralty and maritime jurisdiction is vested in the courts of the United States by Article III, Section 2, of the Constitution of the United States, to wit: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

An appeal from a final decree in admiralty is authorized by Section 128a of the Judicial Code (43 Stat. at L. 936, 28 USCA, Sec. 225, which provides that a Circuit Court of Appeals shall have appellate jurisdiction to review final decisions).

(A) Statement of the Case.

At the time appellee Richardson was injured he was a seaman first class in the United States Coast Guard and was attempting to cross the deck of a tanker owned by appellant but at the time in the repair docks or shipyard of Bethlehem Steel Company for annual inspection, general repairs and modifications for the reason that the Administrator, War Shipping Administration, intended to allocate the vessel to the United States Navy. The vessel was not susceptible of navigation or use in commerce on the date of the accident, to wit, August 6th, 1944, said vessel having been delivered to the Bethlehem Steel Company in the month of July, 1944. Repairs and modifications for the account of the United States of America were actually in progress prior to August 6, 1944. For several days prior to that date the shipyard was also engaged in making certain repairs designated as "owner's repairs." In the making of the repairs on said vessel the workmen of the Bethlehem Steel Company removed a rope barricade which had been placed by the vessel's crew around the port bunker and also raised the port bunker hatch from its position resting upon an iron bar which held the hatch at about a 45 degree angle to the plane of the deck and pushed the hatch all the way open causing the edge furthest from the hinges to lean against a bulkhead located approximately six inches aft of the after edge of the bunker hatch coaming. All of the ship's machinery had been rendered inoperative within 24 hours of the time the vessel was delivered to the shipyard and it had no means of generating electricity or any power of any

kind. The shipyard furnished electric energy to the vessel by connecting electric power from the shore to a receptacle near the main switch boxes of the vessel so that the vessel's electric lights in the cabins and passageways and cargo lights could be turned on by means of the ordinary electric switches or push buttons. The vessel had no portable electric light equipment which could have been used to illuminate the surface of the main deck of the vessel at or near the port bunker hatch.

The employees of the shipyard, when leaving the work at or about 3:30 P. M. on Saturday, August 5, 1944, did not place or cause to be placed any lights in the vicinity of the wide-open port bunker hatch and did not barricade or rope off the area. On Sunday night, August 6, 1944, the appellee Richardson came aboard the vessel by means of a gangway at a point along the starboard rail forward of the forward bulkhead of the midship house. There was a portable electric light at the head of the gangway and this light illuminated the starboard side of the main deck from the gangway to the forward entrance of an inside fore and aft starboard passageway along the level of the main deck. The appellee Richardson entered said starboard passage way, proceeded to the after end thereof, turned to the right and proceeded athwartship to the after end of a similar passageway on the port side, thence he turned to the right and proceeded to the forward end of said port passageway, pulled back a canvas flap, stepped over an 18 inch coaming or threshold with his left foot and allowed the canvas flap to close and then attempted to proceed in total darkness, without hesitating to permit

his vision to become accustomed to the total darkness, turned to the right and took one step with his right foot and placed it in the opening of the port bunker hatch coaming. He sustained a fractured femur and after being treated for several months for a fractured femur, claimed that he also injured his back.

The trial judge found that Tide Water Associated Oil Company owed a duty to the appellee Richardson to either light the area where he was injured or to rope it off or to have closed the port bunker hatch and that there was a breach of such duty and injury proximately resulting therefrom. The trial judge held that there was no contributory negligence involved and that Bethlehem Steel Company was not guilty of any actionable negligence.

(B) The Pleadings.

The libel alleges that Tide Water Associated Oil Company was the owner and operator of the SS Frank G. Drum and at the time of the accident said vessel was on navigable waters of the United States of America, at the repair docks of the respondent Bethlehem Steel Company, and was so docked for the purpose of undergoing repairs by Bethlehem Steel Company; that libelant was a seaman first class, United States Coast Guard; that libelant, on the 6th day of August, 1944, was in charge of a detail of guards in connection with patrolling docks of the Bethlehem Steel Company and ships located on navigable waters of the United States of America at said dock; that his duty was to check upon guards on duty and make fur-

ther checks on docks and ships to verify reports of other coast guardsmen on duty and make complete check-ups on docks and ships at said Bethlehem Steel Company; that respondents (Tide Water Associated Oil Company and Bethlehem Steel Company) knew, or in the exercise of ordinary care should have known all of the duties of libelant; that at about 9:10 P. M. on August 6, 1944, libelant entered said ship in his official capacity and in line with his duties for the purpose of inspecting said ship for the benefit of the said respondents.

Libelant alleges that respondents negligently conducted, controlled and maintained the vessel and the repair docks and negligently and knowingly caused, maintained and permitted the port bunker hatch to remain open and unguarded, in a dark condition and that the respondents "invited and permitted libelant onto said ship for the purpose of making the inspection" and that "while making said inspection and due to the negligence, etc. of the respondents he fell into the open hatch and was thereby damaged." [Ap. 4-12.]

All of the material allegations of the libel, with the exception of the allegation that respondent Tide Water Associated Oil Company was the owner of the vessel were denied by appellant. [Respondent Tide Water's Answer. Ap. 45-53.]

Specification of Assignments of Error.

The Assignments of Error upon which appellant relies are set forth in the Appendix to this brief at pages 24-39 and are summarized in the following statement of questions involved in the appeal of said appellant:

1. The appellant contends that the libel does not state facts sufficient to constitute a cause of action against the appellant.

2. The appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee Richardson on the following specific propositions:

(a) That there was a duty owed by appellant to Richardson.

(b) That appellant breached such duty.

(c) That such breach of duty proximately caused damage to Richardson.

(d) That Richardson was not guilty of negligence proximately causing or contributing to his injury.

(e) That Richardson did not assume all risk of injury.

3. Bethlehem Steel Company was a bailee of the vessel and if there was any duty on the part of any private entity to protect the bodily safety of Richardson, such duty rested solely and exclusively on Bethlehem Steel Company.

4. The only possible negligence which could have existed was negligence on the part of employees of Bethlehem Steel Company for which appellant cannot be held responsible.

5. If the appellee Richardson is entitled to any decree awarding him damages for personal injuries the only private entity from which he should recover is Bethlehem Steel Company.

6. The trial court committed errors in its findings of fact and conclusions of law in the particulars set forth in the Assignment's of Error [Ap. 91-107] and said Assignments of Error are set forth in the Appendix to this brief.

Summary of Argument.

I. The libel does not state facts sufficient to constitute a cause of action. It fails to allege that Richardson was a petty, warrant or commissioned officer in the Coast Guard. Therefore he was not authorized by law to board or inspect the vessel. (Title 14, USCA, Sections 45, 46 and 47.) The libel, aside from the foregoing omission, fails to allege facts showing the existence of any relationship between the appellee Richardson and appellant pursuant to which appellee Richardson was on board the vessel for the purpose of transacting any business with appellant or for the purpose of engaging in any action which was necessarily incident to any business or commercial enterprise being transacted or conducted by appellant. The libel also fails to allege that the appellee Richardson was in or on a part of the vessel provided or intended for permitting a person to proceed from one point to another, such as a passageway. The libel makes an attempt to *create* a *duty* on the part of the appellant by mere allegations of acts or omissions and labelling such acts or omissions as negligent or careless acts or omissions. The use of the descriptive adjectives does not help a libellant to state a cause of action in the absence of allegations of *fact* showing the *existence* of a *legal duty*, to *the* person bringing the suit, by *the* person sued.

II. The evidence fails to establish actionable negligence on the part of appellant for the reason that appellant owed

no duty to the appellee Richardson. There was no duty on the part of the appellant to make the deck of the vessel safe for use by appellee Richardson. Appellee Richardson failed to notify anybody aboard the vessel that he intended to attempt to walk in the vicinity of the open port bunker hatch while that area was dark. In fact Richardson failed to notify anybody on board the vessel where he was going or what he intended to do. That part of the vessel, and in fact the entire vessel, was in the custody and control of the appellee Bethlehem Steel Company.

III. The Bethlehem Steel Company had executed a written contract with the United States of America prior to the time the vessel was delivered to the shipyard of Bethlehem Steel Company and pursuant to the terms of that written contract it was the duty of Bethlehem Steel Company to do all work aboard the vessel in a reasonably safe manner and to take all reasonable precautions for the bodily safety of any person who might *lawfully* come aboard the vessel.

IV. The appellee Richardson was guilty of negligence proximately causing his injury and he also assumed the risk of injury for the reason that he went to a part of the vessel where he had no duties whatever to perform and *claimed* he was looking for *non-existent* fire extinguishers and fire hoses. Appellee Richardson attempted to proceed along the surface of what he thought was a deck although he had actual knowledge of the fact that the vessel was in the shipyard for repairs. By proceeding in total darkness and without taking the slightest precaution for his own safety, he was guilty of negligence which was *the* proximate cause of his injury and he also assumed all risk of injury which might result from *unnecessarily* proceeding in total darkness.

ARGUMENT OF THE CASE.

I.

The Libel Does Not State Facts Sufficient to Constitute a Cause of Action Against the Appellant.

- A. The First Requisite of a Cause of Action for Damages by Reason of Bodily Injuries Is the Existence of Some *Legal Relationship* Between the Person Injured and the Person Claimed to Be Responsible, or in the Absence of Such Legal Relationship There Must Be a Duty Owed, by the Person Claimed to Be Responsible, to the Injured Person as a Member of a Class Intended to Be Protected by an Applicable Statute, or the Person Must Have Been Injured Under Circumstances and in a Place Where the Person Claimed to Be Responsible Owes a General Duty to All Persons Lawfully Present, Such as a Public Highway.

The appellee Richardson was on private property at the time of his injury so we need not consider any point excepting the legal relationship, if any, shown by the allegations of the libel. Richardson's status could be only *one* of three, viz: (a) Business invitee; (b) Licensee; or (c) Trespasser. *All important in a correct statement of the actual relationship, if any, is the part of the vessel where the accident occurred.*

The primary condition precedent to the existence of the relationship of business-invitor and invitee is *business*.

"A business visitor is a person who is invited or permitted to enter or remain upon land for a purpose connected with *business* which *concerns* the occupier. Many courts require that the business be pecuniary in its nature, or of economic benefit to the *possessor*; others require only that it be such that there is an implied representation that care has been exercised to make the land safe for the visitor.

“The *possessor* is required to exercise reasonable care to warn the *business* visitor, or to make the premises safe for him, as to dangerous conditions or activities of which the *possessor knows, or those* which with reasonable vigilance he could discover. The obligation exists only while the visitor is upon *a part of the land which concerns the business of the occupier.*” (Italics added.)

Prosser on Torts, Hornbrook Series, page 635.

The appellant is not conceding, even for the sake of argument, that the appellee Richardson was a business invitee or business visitor, or any type of invitee, but refers to the rules which fix the right and liabilities of business inviters and business invitees for the purpose of demonstrating that appellee Richardson does not state facts sufficient to constitute a cause of action even if he were an actual business visitor.

As is said by Prosser on Torts, Hornbrook Series, West Publishing Co., commencing at the middle of page 640:

“This special obligation toward business visitors exists only while the visitor is upon a part of the land which concerns the business of the occupier, and so is included in his ‘invitation.’ It extends of course to the entrance to the premises, and to a safe exit after the business is concluded. It extends also to all parts of the premises which are thrown open to the visitor, and to those to which the particular business purpose may reasonably be expected to take him. Beyond this, it extends to any unusual places, such as behind a counter, the top of a tank or a workshop, which he may enter with the consent of the possessor for the business purpose. But it does not include unusual parts of the premises, not open to similar visitors, which he may enter without consent, even

for such a purpose; nor does it include places to which he goes for personal reasons of his own, not connected with the business upon which he came. When he goes beyond the limits of his business invitation, he becomes a trespasser, or at most a licensee. . . .”

Again on page 628, Prosser states as follows:

“The courts have encountered considerable difficulty in dealing with public officers, firemen and the like, who come upon the land in the exercise of a legal privilege and the performance of a public duty. Such individuals do not fit very well into any of the more or less arbitrary categories which the law has established. They are not trespassers, since they are privileged to enter. The privilege is independent of any permission or license of the possessor, and there is no right to exclude them. Nor are they properly considered business visitors, since they do not come for any purpose for which the premises are thrown open, and it would be absurd to say that a customs or revenue agent or a policeman on his way to arrest the landholder confers any economic benefit upon him. They are obviously in a class by themselves. Most courts, recognizing that entrance in performance of a public duty entitles the plaintiff to protection, have held that customs, tax and sanitary inspectors, postmen, garbage collectors, and city water meter readers are to be classed with business visitors, toward whom there is an affirmative duty to make the premises safe. On the other hand firemen and policemen are all but universally held to be mere licensees, entering under a license given by law, toward whom there is no such duty. The distinction has been explained on the basis that firemen and policemen are likely to enter at unforeseeable times

and places, and the possessor cannot be expected to have his premises constantly in readiness for them. Granted that this may be true, there is obvious merit in the position of the New York court, that he must at least exercise care to see that the usual means of access are safe for a visiting fireman, although he need not take precautions as to a bulldog in the cellar." (Prosser on Torts, pages 628-630.)

Appellee Richardson, as a matter of law, was not an invitee.

Title 14 USCA, Section 45, provides that:

"Commissioned, warrant and petty officers of the Coast Guard are empowered to make inquiries, examinations, inspections, searches, seizures and arrests upon the navigable waters of the United States for the prevention, detection and suppression of violation of laws of the United States. For such purpose, such officers are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance. . . ."

The only object for which the appellee Richardson could have boarded the vessel in the course of his duty as a member of the armed forces of the United States would be to prevent, detect and suppress violations of statutes of the United States. In other words, disregarding for the moment the fact that he was not a commissioned, warrant or petty officer, he comes within a group of persons who are in the same category as firemen and policemen.

"It has been held that a policeman or constable entering private premises in the performance of his

duty is a mere licensee to whom the owner owes no common law duty to keep the premises safe, although the owner may be liable for an injury resulting from his neglect of a statutory duty with respect to the condition of the premises.”

45 Corpus Juris, 794, Sec. 199.

“A member of a public fire department who enters a building in the exercise of his duties is a mere licensee under permission to enter given by law, and the owner or occupant of the building does not owe to such person any duty to keep the premises in a safe condition.”

45 Corpus Juris, 794, Sec. 200.

In the libel there is no allegation of any fact showing any neglect of any statutory duty with respect to the condition of the SS. Frank G. Drum.

“In the minority of jurisdictions the rule is well settled that, in the absence of a statute or municipal ordinance, a member of a public fire department, who, in an emergency, enters on premises in the discharge of his duty is a mere licensee, *under a commission to enter given by law*, to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury.” (Italics added.)

13 A. L. R. 638.

Please see also:

141 A. L. R. 584, supplementing the annotation in
13 A. L. R. 637-638.

There is no allegation in the libel of any overt act on the part of the appellant.

Assuming, for the sole purpose of argument, (in spite of the authorities hereinabove cited) that the appellee

Richardson could have been an invitee of the appellant aboard said vessel, there is no allegation of any fact showing that he was invited to be in the particular part of the vessel where he sustained his injury. It is an elementary principle that a person may be an invitee in one part of premises and a trespasser or licensee in other parts. For instance, a passenger on an ocean-going liner is an invitee while using those parts of the vessel set aside for the accommodation of amusement of passengers. On the other hand, if a passenger, out of curiosity, roams around the engine room even with the consent of the licensed officers in charge thereof, he would be a licensee. If he did the same act without the consent of the licensed officers, he would be a trespasser. Therefore, if it is legally possible for appellee Richardson to have been an invitee of the appellant, he should allege *facts showing* that he was at *the* place of the accident as an invitee of the appellant.

Appellee Richardson fails to allege in his libel that he was using any passageway which was designed for the purpose of affording access from or to any part of the vessel.

Please see excerpt from 45 Cal Jur. 798-802, Sec. 203, Appendix A, page 1.

Disregarding, for the moment, the many adjectives used by appellee Richardson in qualifying the alleged acts which resulted in his injury, it is clear that the physical cause of the injury was an open hatch in some part of the vessel. The reason, as stated by Richardson, for his fall into the open hatch was that said open hatch was not illuminated so that the appellee Richardson could see said open hatch.

Appellee Richardson alleges that the vessel was docked at the time and place for the purpose of undergoing repairs by appellee Bethlehem Steel Company. [Ap. 6.] He therefore had knowledge of the fact that he could not reasonably expect the vessel to be in the same condition throughout as might be the case if the same had not been withdrawn from navigation.

If Richardson was at most a licensee, he must allege facts showing that appellant committed some overt act after Richardson boarded the vessel as such licensee and that such overt act proximately caused his injury. There was no affirmative duty on the part of appellant to perform any act such as lighting the area around the hatch. Appellant's only duty would be to refrain from committing an overt act of negligence after Richardson came aboard. A licensor is entitled, under the law, to remain passive and has no affirmative duty. There is no allegation of any fact in the libel showing that Richardson notified any responsible agent of appellant that he intended to go to the particular part of the vessel where the open hatch would be encountered. Appellee Richardson does not even allege that any agent or employee of appellant was aboard the SS. Frank G. Drum at the time Richardson went aboard. All he says is that John One was charged with the duty of permitting members of the Coast Guard to board the SS. Frank G. Drum for the purpose of making inspections of said ship and that John Five "was in charge of that certain ship which was then and there known and referred to as SS. 'Frank G. Drum' hereinafter mentioned."

Appellant has already shown (14 U.S.C.A., Sec. 45) that there wasn't anything appellant could have done about keeping appellee Richardson off of the vessel. The mere fact that John Five was in charge of the vessel does not

mean that John Five was on the vessel or an agent of appellant.

It is clear from the allegations in the libel that appellee Richardson boarded a vessel which was known to be in the repair docks of Bethlehem Steel Company for the sole and exclusive purpose of repairs, and that therefore any person possessing the normal use of ordinary perceptive faculties would realize that unusual conditions existed and might be found at any part of the vessel. Under these circumstances the law as set forth in the case of *Ambrose v. Allen*, 113 Cal. App. 107, 289 Pac. 169, is directly applicable.

Please see excerpt from opinion, Appendix B, page 3.

The decision of the Court in *Kolburn v. P. J. Walker Co.*, 38 Cal. App. (2d) 545, 101 P. (2d) 747, is also in point. Please excerpt from opinion, Appendix C, page 7.

Appellant, being somewhat confused by what has occurred in the lower court, requests this Court, in the exercise of its duty to protect the rights of appellant as guaranteed by the 5th Amendment, Constitution of the United States, to *decide*, in language which *fairly* answers the question, how the Tide Water Associated Oil Company *could* have been a business invitor or *any* kind of *invitor* of appellee Richardson, unless it *could* have lawfully *refused* to allow him to come *aboard the vessel*. This question cannot be answered by a casual reference to the cases, state and federal, involving customs, tax and sanitary inspectors, postmen, garbage collectors, or city water, gas or electric meter readers, etc., because in each such case the individual official *could* have been kept off the premises if the possessor thereof elected *not* to

conduct thereon any business enterprise which would *require* the presence of such persons, from time to time, in the performance of *statutory* duties, in specific parts of the premises. In the case at bar there is *no* statute to which the appellee Richardson can point which gave to him any right to board the vessel on account of *any* activity being conducted by *Tide Water Associated Oil Company* while the vessel was *in the shipyard* of Bethlehem Steel Company. A reference to the basic logic underlying the conclusions of Courts as to the existence of a legal duty on the part of an *operator* of a *merchant* vessel to exercise toward a United States Customs Inspector the same degree of care it would exercise for the protection of any business invitee will make clear the obvious non-applicability of the rule of duty to the appellee Richardson in the case at bar. The operator of a *merchant* vessel, actively engaged in interstate or foreign commerce, voluntarily accepts cargo and passengers as a common carrier by water. It *cannot*—and knows it cannot—perform its contractual obligations to consignor, consignee or passenger until the customs inspector performs his official duties. Until official clearance has been accomplished neither cargo nor passenger may go ashore and the *business* of the operator would be at a standstill. The operator impliedly represents to the consignors, consignees and passengers that it will make all arrangements required by law as conditions precedent to the unloading of cargo and the disembarking of the passengers. Therefore, aside from the *statutory* right of the inspector to board the vessel, there is at least an implied representation of the operator to its customers and passengers that all officials, without whose permission no person or thing can leave the vessel, will be requested and invited to come aboard. On the other hand, if the vessel *has been cleared*

and is then *withdrawn* from *commerce and navigation*, no customs inspector would have the slightest right to board the vessel in his *official* capacity.

There is no allegation of fact in the libel stating that the SS Frank G. Drum was being operated or used in *any* commerce on August 6, 1944, or that the Tide Water Associated Oil Company was at said time using the vessel in *any* business enterprise, or that there was *any* contractual or statutory relationship between appellee Richardson and appellant.

As a matter of fact, the libel alleges, in legal effect, that the SS. Frank G. Drum had been and was at said time *withdrawn* from *all* commerce and navigation. Article Eighth [Ap. 6] alleges that the vessel "was . . . at the repair docks of the respondent . . . *Bethlehem Steel Company* . . . and that said ship was so docked at said place and time for *the* purpose of *undergoing repairs* by the said respondent . . . *Bethlehem Steel Company.*"

Of considerable importance also—ignored by the lower court—is the proclamation of the President (Executive Order No. 9054, 7 Fed. Reg. 837, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327) pursuant to which the President established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration, under the direction of an Administrator appointed by and responsible to the President. Said Executive Order—having the force of law—provides that the *Administrator*—not the owner of any vessel—"shall" perform the following functions and duties:

"The Administrator shall perform the following functions and duties: a. Control, the operation,

purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.” (Title 50 U.S.C.A. App. sec. 1295.)

There is, and obviously could not be, no allegation in the libel stating that Tide Water Associated Oil Company, as owner of the vessel, had the *slightest* right to control the operation or *use* of the SS. Frank G. Drum on August 6, 1944. There is no allegation of fact stating that the vessel was at the repair docks of Bethlehem Steel Company for the purpose of undergoing repairs by said Bethlehem Steel Company pursuant to any *volition* of Tide Water Associated Oil Company. The allegation of the legal *conclusion*, in Article Eighth that on August 6, 1944, the Tide Water Associated Oil Company was the *operator* of the vessel is entirely nugatory in the face of the existing law providing that the *operation and use* of *all* ocean vessels under flag or control of the United States—whether or not privately *owned*—was subject to *exclusive* control of the *Administrator*, War Shipping Administration. The said legal conclusion of the pleader is also *nullified* by the allegation of *fact*, in the same Article, that the vessel was in the *physical* custody of Bethlehem Steel Company at *its* repair docks, at said time, “for the purpose of undergoing repairs by the *Bethlehem Steel Company*. The vessel could not have been “*operated*” and Tide Water Associated Oil Company could not have been an “operator” of the vessel for the simple additional reason that no person is an “operator”

of a vessel which has been withdrawn from all commerce or navigation and *cannot* be used in commerce or navigation until it is inspected and passed as to seaworthiness by the United States Steamboat Inspectors.

The lower court also ignored the contention of Tide Water Associated Oil Company that the mere fact that legal title to the vessel was vested in said appellant, coupled with the fact that the relatively few members of the crew who were aboard the vessel on Sunday, August 6, 1944, were *technically* employees of Tide Water Associated Oil Company, did not give to said company the *right* to control said "employees" because the Administrator was in *sole and exclusive* control of the *use* then being made of the vessel while it was in the physical custody of Bethlehem Steel Company.

The act of Richardson in coming aboard the vessel as a seaman in the armed forces of the United States was a use by him of the vessel and was within the exclusive control of the Administrator, War Shipping Administration. The crew members were not the agents of Tide Water Associated Oil Company in their activities, if any, in the use then being made of the vessel by Richardson because no principal is legally responsible for an actual *tort* of an "agent" unless at the time of the commission of the tort the "agent" was acting in the course and scope of his agency. None of the men aboard the vessel on Sunday, August 6, 1944, was there as a *member of the crew* for the reason that the vessel, as clearly alleged in the libel, had been and was withdrawn from commerce and navigation and could not have been in *any* commerce or navigation at said time. The allegations of the libel, plus the provisions of the Executive Order of the President, show as a *matter of law*, that even if the members

of the crew were the *general* employees of Tide Water Associated Oil Company, they were not at all subject to any authoritative control by Tide Water Associated Oil Company, and that they were under the sole and exclusive control of the Administrator, War Shipping Administration.

If the vessel was being operated or used by any entity whatever, that entity was the War Shipping Administration. Therefore the use of the vessel for the *sole* purpose of having it *repaired*, being within the *exclusive control* of the Administrator, War Shipping Administration, the work, if any, performed by the men remaining aboard the vessel while it was in the repair docks (shipyard) of Bethlehem Steel Company, was that of the War Shipping Administration and not that of Tide Water Associated Oil Company.

There is no allegation of *fact* in the libel stating directly, as is required by the provisions of the General Admiralty Rules of pleading, that *any* servant of Tide Water Associated Oil Company, acting in the course of his employment, caused or permitted the hatch to the bunker tank of said vessel to be or remain open or unguarded or in a dark condition. The allegation in Article Twelfth of the libel [Ap. pp. 8-9] is that the *respondents* (two *corporations*)* “knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained said SS. Frank G. Drum, etc.”

*See amendment to libel, Ap. 73, which eliminated the persons referred to by fictitious names as respondents and changed them to claimed agents, servants or employees of respondents Bethlehem Steel Company “and/or” Tide Water Associated Oil Company.

Thus the libel, as amended, does not allege that *any* employee of Tide Water Associated Oil Company had anything whatever to do with *any* of the claimed acts or omissions stated in Article Twelfth of the libel. While it is obvious that a corporation may act only through its officers, managers, agents or employees, it cannot itself be a tortfeasor. Therefore, a libel for damages, by reason of personal injuries, *must* allege *facts* which, if true, bring into effect the maxim *respondeat superior*. *There are no such allegations in the libel.* (Please see *Fimple v. Southern Pac. Co.*, 38 Cal. App. 727, 177 Pac. 871, as to requirements of pleading a claimed *respondeat superior* responsibility.)

If we assume, without conceding, that the allegation to the effect that a *corporation* has negligently caused, maintained or permitted a hatch on a vessel to be and remain open, unguarded and unlighted, is an allegation that the acts were committed by the corporation acting through an officer, servant or employee of such corporation while in the course of his agency or employment, such assumption will not establish any statement of a cause of action for the reason that, as a matter of law and no matter what inherently improbable or lawfully impossible relationship is alleged directly or by implication, *if* the persons *actually* aboard the vessel were the *general* servants of Tide Water Associated Oil Company, they were, while *any* use was being made of the vessel, the servants of the War Shipping Administration. This is so, *as a matter of law* and *regardless of any words* used by the pleader in a futile attempt to *circumvent* or *ignore* the provisions of positive law to the contrary, for the reason that the Administrator, War Shipping Administration, having the *exclusive* right to control the "*operation and use*" of the

vessel could only exercise such right of absolute and exclusive control if he possessed the exclusive authoritative right to control and direct the persons engaged in any work incident to such operation and use in and about the *details* connected with *how* such work was to be done.

Therefore, Tide Water Associated Oil Company would not be legally liable for any tort actually committed by any *general* employee aboard the vessel because the *work* such persons *may* have been doing while the vessel (and necessarily its personnel) was being used by the War Shipping Administrator for *the* purpose of having the same repaired was the work of the Administrator. Therefore, any negligent act or omission of such persons was not that of the general employer but that of his employer, *pro hac vice*, the War Shipping Administration, and its negligence, if any, would not be imputed to Tide Water Associated Oil Company.

The leading case on the subject of the "loaned servant" doctrine is *Denton v. Yazoo & M. V. R. R. Co.* (1932), 284 U. S. 305. Please see excerpt from opinion, Appendix D, page 9.

So every similar attempt to recover from private companies for the negligence of their employees in the course of doing the work of the United States has been rejected. See *Norfolk & W. Ry. Co. v. Hall* (4th Cir., 1932), 57 F. (2d) 1004, 1008; *McLamb v. DuPont* (4th Cir., 1935), 79 F. (2d) 966; and *cf. Hardy v. Shedden Co.* (6th Cir., 1897), 78 Fed. 610, 613; *Byrne v. Kansas City, Ft. S. & M. R. R. Co.* (6th Cir., 1894), 61 Fed. 605. See 61 A. L. R. 290.

Apart from some *statute* providing otherwise, no corporation can be compelled, within the meaning of due process of law and the right to the equal protection of the

laws (5th and 14th Amendments, Constitution of the United States) to respond in damages to a person injured by the negligence of another unless the activities of the latter, at the time and place of the tort, was subject to the control of the corporation under such circumstances as to bring the maxim *respondeat superior* into operation and effect.

The trial judge held that the provisions of Section 45, Title 14, U. S. C. A., were of no importance in this case. Appellant contends that said statute precludes the appellee Richardson from contending successfully that he had any lawful right to board the vessel. The statute, in so far as it is relevant to the case at bar, is set forth in the Appendix E at page 11.

Pursuant to the foregoing sections it is obvious that *officers* of the Coast Guard were agents of the Administrator, War Shipping Administration. He was an official "within the office for Emergency Management of the Executive Office of the President." (Executive Order Nos. 9054 and 9244, *supra*.) There is no allegation in the libel to the effect that the appellee Richardson was on board the vessel pursuant to any "rules or regulations promulgated by such department or independent establishment charged with the administration" of any of the provisions of the statutes conferring authoritative power upon the President during the existence of a state of war. The libel alleges that Richardson was at all times mentioned therein a "Seaman First Class" in the Coast Guard.

The only contingency pursuant to which enlisted men below the grade of "petty officer" could have boarded the vessel would occur if a commissioned, warrant or petty officer was faced with resistance by persons thereon. He

could then "use all necessary force to compel compliance." In doing so, such officer would be lawfully entitled to bring aboard or send aboard such number of armed seamen as might be required to subdue the persons who stand in the way of the performance of the duties of such officer as provided in said section 45, Title 14, U. S. C. A.

It is apparent from an inspection of the libel and a consideration of the foregoing laws of the United States that Richardson was not in the legal position of a customs inspector for the simple reason that there is no statute pursuant to which he had any lawful right to board the vessel under the circumstances alleged in the libel.

A most important element in considering the sufficiency of the allegations in the libel is the fact that Tide Water Associated Oil Company did not *voluntarily* enter into contractual relationship with the Administrator, War Shipping Administration with reference to the "time charter" of the vessel. The fact, as alleged in the libel, that appellant was the *owner* of the vessel at the time of the accident is of no importance in the absence of a specific allegation that the vessel and its use were at said time under the *control* of *appellant*. It has been conclusively shown that the operation and use of the vessel was under the *exclusive* control of the Administrator, War Shipping Administration.

If the vessel had been "time chartered" in a time of peace it is obvious that only the *charterer* could be an invitor of persons (excluding the members of the crew)

who might come aboard for any purpose connected with the *business* of the charterer. The *owner* of the vessel would not be using the vessel in commerce. When a *merchant* vessel of the United States is time chartered in peace time, a full crew is ordinarily furnished with the vessel, and there is at least an implied agreement on the part of the owner that such crew will keep the vessel in a reasonably safe condition for the conduct of the business enterprise of the time charterer. If there is a failure on the part of the crew to perform such duty there would be a breach of the contractual obligations owed to the *time-charterer*. An invitee of the time-charterer, not being in privity of contract with the owner, would have no cause of action for damages against the *owner* of the vessel for the reason that there would be no *relationship* between such invitee and the owner which would give rise to a legal duty to keep the vessel reasonably safe for the use of the vessel by such invitee of the time-charterer. The legal duty to the invitee would be imposed on the time-charterer. Of course, the time-charterer would be entitled to be protected against any loss by way of indemnity. That right to indemnity is not a tort liability of the owner. It is strictly contractual and the time-charterer would not have to allege or prove a *negligent* failure on the part of the crew to keep the vessel in a reasonably safe condition. Upon being sued, in any court, by the invitee, the time-charterer would be entitled to implead the owner pursuant to General Admiralty Rule 56 for the reason that the time-charterer would have the right to a decree or judgment placing the duty to protect the time-

charterer from loss directly upon the owner. The fact that the owner would have to pay the amount of the damages directly to the invitee does not mean that there is any breach of duty owed by the owner to the invitee of the time-charterer.

No doubt the appellee Richardson can cite many cases holding that when there is a time-charter, the owner of the vessel remains the employer of the crew and therefore remains in control, through the master of the vessel, of the navigation and physical handling of the vessel. Such cases are not pertinent or controlling precedent in the case at bar because the executive orders of the President hereinabove set forth placed the exclusive control of the operation and use of the vessel in the Administrator, War Shipping Administration. That exclusive control of the Administrator effectively brushes aside all case-made maritime law involving the legal responsibilities of the owner of a time-chartered vessel for the reason that in every such case the court predicated its judgment upon the reasonable and logical premise of the absolute control of the owner of the vessel in respect of the navigation and handling of the vessel. *That essential premise is absent here.* When the reason for a rule of law is non-existent, such rule is not applicable.

Appellant filed detailed exceptions to the sufficiency of the libel. (Ap. 13-16.) They are set forth in the Appendix to this brief at pages 40-54. It has always been the law that the lack of a statement of facts sufficient to show a cause of action may be asserted at any time, even on appeal. The appellant contends that the judgment of the trial court must be reversed for the reason that the libel fails to state facts sufficient to constitute a cause of action against Tide Water Associated Oil Company.

B. The Facts as Alleged in the Libel Show, as a Matter of Law That the Bethlehem Steel Company Was a Bailee of the Vessel From the Time It Was Delivered to the Shipyard of Bethlehem Steel Company.

It is a presumption of law, *conclusive* until rebutted, that official duties and functions have been performed. The Administrator, War Shipping Administration, was required by law to negotiate with all shipyards, contracts pursuant to which American Flag vessels would be accepted and repaired by various entities, including Bethlehem Steel Company, during the progress of the war. The standard contract forms issued by the War Shipping Administration, printed for the use of the Committee on the Merchant Marine and Fisheries, by the United States Government Printing Office, Washington, D.C., in 1945, contains a form of contract which was in full force and effect between the United States of America and Bethlehem Steel Company at the time the vessel SS FRANK G. DRUM was brought into the shipyard by the master of the vessel. The contract form is printed in said volume, commences at page 432.

The essential provisions of the contract are called to the attention of this Honorable Court and are set forth in the Appendix F at page 13.

In addition to the obvious result of the terms of the foregoing contract with reference to the sole and exclusive control of the vessel by Bethlehem Steel Company, appellant cites the following cases:

Long v. Silver Line, 41 F. (2d) 367 (Dist. Ct.);

Long v. Silver Line, 48 F. (2d) 15 (C. C. A.).

In *Crane Elevator Co. v. Lippert*, 63 Fed. 942, the owner of a building entered into a contract with an ele-

vator company to install some new elevators. The elevator company cluttered up a hallway which was used by tenants of the owner of the building and the hallway was not lighted and an employee of one of the tenants of the building fell by reason of the accumulation of debris and brought suit against the elevator company. The plaintiff prevailed and the elevator company took an appeal. The Court says, at page 947:

“In the case before us there was a duty owing to the defendant in error, coupled with its breach, from which a right of action arose in his favor, if he was free from contributory negligence. Having placed obstructions in the hall, the duty rested upon the plaintiff in error to exercise reasonable care and prudence to protect from injury those having lawful occasion to use it, by means of lights or other suitable safeguards. This duty required the exercise of care and diligence on its part in proportion to the danger occasioned by the presence of these obstructions. It saw fit wholly to neglect the performance of this duty. It relied upon the lighting of the hall by the owner of the building as the sole means of protection against injury from these obstructions. Having intrusted to another the discharge of a duty resting upon itself, the plaintiff in error is responsible for a failure in its performance.”

It is respectfully contended that the libel in the case at bar does not measure up to the minimum requirements of General Admiralty Rule 22 which provides that “the libel shall . . . propound and allege in distinct articles the various allegations of fact upon which the libelant relies

in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article”

General Admiralty Rule 27 is also important in considering whether a particular pleading measures up to the requirement that it state facts sufficient to constitute a cause of action because it provides:

“Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings . . . filed by the other party”

The libel in the case at bar does not comply with the minimum requirements with reference to the statement of facts showing (1) a legal duty owed by Tide Water Associated Oil Company to appellee Richardson; (2) That there was a breach of such legal duty; and (3) Damage proximately resulting from such breach.

Mere ownership of the vessel is of no importance. The question of control of the vessel is the important consideration with reference to the first element of a claimed tort liability. This Honorable Court will notice in its examination of the text in Prosser on Torts, *supra*, that responsibility with reference to invitees, licensees and trespassers is placed, in accordance with the distinct legal principles applicable to each such classification, upon the *possessor* of the particular physical property involved. The same principles are recognized in all standard text books and legal encyclopedia discussing the subject. They are also recognized in the Restatement of the Law of Torts, Vol. II, Chapter 13, Sections 329 to 346.

II.

There Is No Evidence in the Record Sufficient to Sustain the Implied Findings of Fact That Appellant Was Guilty of Actionable Negligence; That Appellee Richardson Was Not Guilty of Negligence Proximately Causing or Contributing to His Injury; or That Appellee Richardson Did Not Assume All Risk of Injury.

In this subdivision of the brief, Assignments of Error from and including I to and including XLV [Ap. 91-102], are involved and are the bases of the foregoing summarized specification of error. These Assignments of Error are set forth *verbatim* in the Appendix.

When the SS FRANK G. DRUM was brought into port for the purpose of annual inspection and repairs, the port bunker hatch was resting on an iron bar, at about a 45-degree angle. [Ap. 419.] At the time the vessel was brought into the shipyard of Bethlehem Steel Company there was also a barricade consisting of rope around the partly opened hatch which, if left in said condition, would have prevented any person from getting near the opening of the hatch. [Ap. 420-421.] The port bunker hatch remained in said position, resting on the iron bar and effectively roped off, up to the time the appellee Bethlehem Steel Company started to do work, when said appellee raised it. [Ap. 420.] Within twenty-four hours of the time that the vessel was *delivered* to the shipyard of Bethlehem Steel Company all of the machinery of the vessel was rendered inoperative. [Ap. 421-422.] Employees of the shipyard were doing work which required the removal of the rope-barricade and the complete opening of the port bunker hatch so that it was leaning up against the bulkhead and said employees opened said bunker hatch. [Ap. 425-427.] No work was done by

any members of the crew at or about the port bunker hatch during the time the vessel was at the shipyard. [Ap. 456.] The bunker hatch remained in its absolutely safe condition until the shipyard workers commenced working on it. [Ap. 479.] After the accident had happened the port bunker hatch was roped off and a light was placed over it. That work was not done by any member of the security watch on board the vessel. The only person connected with the vessel who could have given an order to do such work was the third mate and he did not order the deck force to do it. He gave no order to anybody in the crew to do it. [Ap. 453-454.] Appellee Bethlehem's superintendent of hull repairs stated that the vessel came into the shipyard of said appellee in July, 1944, for repairs and that "the hull repairs consisted of damage to the shell and general repairs to bulkheads or decks or hatches, whatever was found necessary; that the company did quite a bit of work on the vessel; and that she entered the yard on July 26th and left the yard on August 18th, 1944." [Ap. 383-384.] It was the custom and practice of Bethlehem to replace all ropes and stanchions present at the start of work when a hatch is to be permitted to remain open during the night-time. If that particular bunker hatch had been roped off when the ship came into the shipyard, then the employees of Bethlehem were subject to general instructions to leave the ship as safe as they could when leaving the ship over night or over a weekend. [Ap. 394-396.]

The only *outside* lighting facilities belonging to the vessel which could have been turned on by means of any switch which was a part of the vessel's equipment were the mast lights. [Ap. 423.] While the vessel's equipment included portable lights, they could not have been

used for the reason that they were equipped with *marine* fittings; not the ordinary male type of plug. [Ap. 459.] In addition to the running of a power line to the ship's main electrical system, the shipyard also runs temporary lines on board, the full length of the ship but the ship's portable lights would not plug into the shipyard's plug-boxes. [Ap. 447-448.] Bethlehem's men came aboard after the accident and placed the port bunker hatch back on its iron rod support, roped the hatch off and placed a light there. [Ap. 430.]

William A. Harrington, assistant manager of Bethlehem Steel Company, was in charge of all work in the yard. He obtained a form dated July 21, 1944, from the coordinator (evidently an official connected with the War Shipping Administration) carrying the C. M. P. allotment serial number, calling for the drydocking of the vessel and some normal underwater repairs. That was then *followed* up by a survey for some of the *owner's* repairs *after* the vessel arrived in the yard. [Ap. 326-328.] It was the intention of the War Shipping Administration to allocate the ship to the Navy and the shipyard did certain extensive repairs and modifications required by reason of the anticipated use of the vessel by the Navy. That work was done simultaneously with "the owner's repairs." The Bethlehem Steel Company billed the repairs ordered by the War Shipping Administration to the agency. [Ap. 330-331.]

J. J. Schleef, chief engineer of the SS. Frank G. Drum, called as a witness by appellant, testified as follows:

I am familiar with the fire fighting equipment on the vessel at the time of the accident at Bethlehem Steel Company dock. There was never any hydrant on the bulkhead immediately aft of the bunker tank

we are talking about. The first hydrant on the main deck is forward of the pump room. The one aft is in the alleyway so that there was no hydrant or hose anywhere along that bulkhead; there was no fire hydrant attached to that bulkhead or on that bulkhead. The nearest fire hydrant was underneath the catwalk and to the starboard side of the catwalk at point marked "X-S" [referring to Libelant's Exhibit 2]. There were no fire extinguishers belonging to the ship on any weather decks or outside. They are all in the top and bottom alleyways, the 'midship house and under the forecastle head; none in any place where they would be exposed to any sea or fog or anything of that kind. [Ap. 416-419.]

There were no permanent light fixtures which belonged to the ship which could have been used to illuminate this (port) bunker hatch. A temporary portable light would have to have been put there. [Ap. 423.]

I was aboard the vessel the night Richardson was injured. I was walking back and forth on the poop deck forward of my quarters, on the starboard side, one deck higher than the main deck, in the after part of the ship. From where I was walking up and down I happened to see him come aboard and I saw him crossing the top engine room grating at the time. I had gone into the engine room to tell the oiler on watch to see that the boilers were dry and to pump them if they were not and that is when I saw him going from the starboard side to port. He entered the port passageway from the engine room grating, the door leading into the port alleyway. At that time I had no actual knowledge, or personal knowledge,

of the fact that this (port) bunker hatch was open.

I had observed the shipyard workers around that bunker hatch from time to time in the daytime, while they were working, and I had an opportunity to observe them. I saw that the tank top was open. [Ap. 423-425.]

On August 6, 1944, shortly after I got back on deck "with the bos'n" the bos'n heard a voice hollering for help from the tank. We went over to the port bunker hatch and helped the boy out. At the time I got there the bunker hatch was wide open, up against the bulkhead. There were no lights there and no ropes around it. [Ap. 426-247.]

Right after the accident happened there was a light in place there and the hatch was put back on the support and a rope put around it. The light and putting the hatch down on the stiff leg wasn't done by the ship's crew. It was Bethlehem's men because I recognized the temporary light man. When our lights went out at night in the quarters, we were to call for the temporary light man because it was up to them (Bethlehem Steel Company) to furnish the lights. I did not call for the temporary light man in this case because that light didn't interest me. [Ap. 431.]

The closest light in the port passageway to the opening of the door at the forward end of the port passageway (the one Richardson last used) was 15 or 16 feet aft of the door. That light furnished no illumination for the surface of the deck immediately outside of the hatch through which you make exit from that port passageway. No light would shine because at the time, this was during the war and we had shields on those permanent lights. They all had

the wire guard and we shielded them with metal or tin so it wouldn't reflect out on the deck; so that the passageway in that particular place is quite dark and there would be no light out on the deck immediately outside of that hatch which would illuminate the deck at all; no illumination. [Ap. 433.]

I didn't see Richardson after he left the engine room and went into the port alleyway. I didn't see him again until after we hauled him out of the tank. [Ap. 436.]

I came aboard about 3 o'clock Sunday afternoon. The accident happened somewhere around 9:30 P. M. I went ashore about 8 o'clock that Sunday morning. I was not aboard the ship at 3:30 Saturday afternoon, August 5th, when Bethlehem quit work. [Ap. 436-437.]

During the time from 3 o'clock Saturday afternoon, August 5, 1944, up until Sunday night at 9 or 9:30 I had not at any time gone in or come out of the aft port entrance. I had not been at or near or in close proximity to the port entrance passageway. The first time I was on the port side was when I heard the boy hollering for help. I had no occasion to go to the port side. All I was interested in is what happened in the engine department. My job is to stand security watches and to see that the ship doesn't sink or that the bilges fill up and the like of that. [Ap. 438.]

There was a bos'n on board and his duties, on security watch, are mostly to see that the lines are kept tight so that she (the vessel) doesn't break away from the dock and the like of that. [Ap. 438-439.]

We knew that workmen who cleaned the port bunker tank came into the yard on July 26th. I couldn't say whether it was the Ship Service people who took the rods off the hatch. I know it wasn't the ship's crew because none of them worked there. [Ap. 450-451.]

Asa Humble, called as a witness by appellant, testified as follows:

I did not at any time know that the port bunker hatch was left open while the ship was in the shipyard. I do not recall of ever having seen the port bunker hatch open at night while the ship was in the repair yard before this Coast Guardsman fell into it. I was aboard on the night of the accident in the capacity of a security watch, deck officer, third mate. [Ap. 452-453.]

After the accident happened the port bunker hatch was roped off and a light was placed over it. I don't recall who did it but I did not order the deck force to do it. I gave no orders to anybody in the crew to do anything like that. There was nobody aboard excepting me who could have issued such an order to the deck department that night. There was no other member of the deck department who had supervisory capacity over the crew members of that department. I was the only officer aboard, so far as the deck department was concerned. [Ap. 453-454.]

I had no occasion to go near this particular bunker hatch at any time while the vessel was in the shipyard and to my knowledge there was no work done by any members of the crew at or about that port bunker hatch during the time the vessel was at the shipyard. [Ap. 456.]

Albert D. Vanover, called as a witness by appellant, testified as follows:

I at no time gave any orders to any members of the deck department to take any ropes away from the port bunker hatch. I was second mate. I had no personal knowledge of the fact that the port bunker hatch was open. I had nothing to do with the repairs.

I know where the fire extinguishers are located on that vessel. They were always inside. [Ap. 463.]

Adrian Rolland Frederick, called as a witness by appellant testified as follows:

I was chief officer on the SS. Frank G. Drum. I know the position and condition of the port bunker hatch on the Frank G. Drum at the time the ship was taken into the Bethlehem Steel Company shipyard. I gave the orders to secure it. The hatch, at the time the ship was taken into the shipyards, was resting on a leg attached to the lower side of the hatch itself. This leg held the hatch open at about 45 degrees; in other words, about halfway open. Besides this there was a ship's two inch line attached to the bulkhead, laid around this hatch and fastened to the after side of the pump house. While it was only a light line it would prevent anybody from accidentally falling into the hatch. In other words, it was just simply a safety measure in case somebody might want to get down there. The port bunker hatch was in the condition I have told you about up to the time the Bethlehem Company started to do work on that ship. That safeguarding was not removed by any member of the ship's crew. I had

charge of my bos'n and crew and there is only certain work the crew can do in a shipyard. There are a number of things that the crew wouldn't do in a ship on account of the regulations. [Ap. 465-467.]

I wasn't on board on Sunday evening. I wasn't on board on Sunday night at all. [Ap. 468.]

I didn't see anybody actually take the rope down that I have spoken about or lift the hatch cover back from the stiff leg. All I know is that my gang didn't do it. I was not present when it was done and didn't order anybody to do it. [Ap. 471.]

The deck men on board the ship were under my control; I gave them orders as to what they should do. I gave my orders to the bos'n. [Ap. 472.]

I make it a habit while I am on board a ship to be on deck at all times when I am on duty and I must have seen that hatch several times during that day (Saturday, August 5, 1944), and when I did there was always some of the yard men working around it or in it. As they had charge of that hatch, I didn't consider it my duty in any way, manner or form, to interfere in any way and I left it up to them entirely. I left it up to them to leave the hatch the way they found it, or I supposed they would anyway. [Ap. 475.]

I was aboard the vessel on Saturday, August 5th, from 8 A. M. until 3:30 P. M. I saw the shipyard people leave. The fact is I followed them off. [Ap. 474.]

I considered it part of the duties of a mate on board the ship to see that there was no fire hazard and that the ship is secured and that all fire-fighting equipment is ready for instant use, and that is what

I did. My duty also to the owner of the vessel would be to see that no condition was permitted to exist which would endanger the safety of the *ship*. When I talk about safety of the ship I mean the ship itself and not whether the ship is safe for Coast Guardsmen; whether the ship *itself* is in danger. [Ap. 476.]

If we assume that the shipyard had been working on the ship and they had taken away a long section of railing alongside of the ship and had failed to put up any chain or any rope along there so that the side of the ship was open and anybody walking across it would fall down into that place and I came on board the ship and found that condition, my testimony would be that I wouldn't do anything about it if the yard crew was doing work there or near it or coming back. As to this hatch, I didn't know whether they were coming back at 12 o'clock at night, 8 o'clock or any other time. All I knew was they had knocked off and left the hatch open and I assumed they were coming back to work that night. I was not on the ship on Sunday. The next time I came back to the ship was Monday morning. [Ap. 476-477.]

Oscar Bengston, called as a witness by appellant testified as follows:

I was the master of the SS. Frank G. Drum in charge of the vessel when it was brought into the Bethlehem shipyard at San Pedro. While the vessel was at sea the port bunker hatch was cleaned out, washed out. After it was cleaned out the tank lid was left on its support, at about a 45 degree angle, and there was some rope stretched around it also.

That was the condition of that bunker tank and the hatch when the ship was brought into the shipyard and it remained in that condition up until the time the shipyard workers commenced working on it. [Ap. 479.]

The location of the fire extinguishers on that vessel were. There were some under the forecastle head, some in the 'midships house, some in the passage-way, on the poop deck and engine room and fire room. There were no portable fire extinguishers belonging to the ship, of any kind at any place where they would be exposed to the weather. [Ap. 479.]

The closest fire hydrant which was located on the main deck, closest to the forward bulkhead of the after house, was 10 feet forward of the pump room. [Ap. 479-480.]

The vessel was on a time charter to the War Shipping Administration at the time it was in the yard. [Ap. 480.]

“Q. By Mr. Gallagher: Captain, how long was that vessel withdrawn from navigation in 1944?

Mr. McHose: What do you mean by ‘withdrawn from navigation’?

Q. By Mr. Gallagher: While it was in the shipyard being repaired, it wasn't being navigated? A. It wasn't possible to navigate it.

Mr. McHose: Do you mean how long was it up in the shipyard?

Q. By Mr. Gallagher: How long was it in the shipyard, without any power, without its machinery in operation? A. Between three and four weeks.” [Ap. 489.]

Appellee Richardson testified, in so far as his testimony is material or relevant on this appeal, as follows:

My Commanding Officer, Lieutenant Gregory, at 8 o'clock p. m. on August 6, 1944, told me to go aboard all vessels in Bethlehem Steel (Company shipyard) and make an inspection; looking for fire extinguishers, hoses, and to take a report from the mate sometime when I was on the ship; no other duties. [Ap. 154-155.]

When I got those orders I went to the Bethlehem Steel gate. showed my I. D. card, signed the log and went in at the gate. Then I went aboard the Frank G. Drum. [Ap. 155.]

I went up the gangplank. There was an electric blublight fastened to the side of the ship, the ship's shell, right at the top of the gangplank. There were lights on the dock. There was no other light that I saw on the ship. When I got onto the ship the first thing I did was I stopped and glanced around to see if I could see anyone on deck; not seeing anyone, I walked into the starboard passageway. [Ap. 157.]

My point of exit from the port passageway is "X-2" on Libelant's Exhibit 2. I am indicating I went through the opening at the end of the port passageway, turned to the right, and this little object which is shown to be a space 4 feet by 6 feet, is the hatch down which I fell. The hatch is marked "X-3" on Libelant's Exhibit 2. [Ap. 205.]

My purpose in walking from "X-1" [the main deck at the top of the gangway, Libelant's Exhibit 2] over to "X4" [forward entrance of starboard pas-

sageway, Libellant's Exhibit 2], and going through this lighted passageway over to "X-2" was to make a general inspection. [Ap. 207-208.]

The main deck was dark when I stepped out from the passageway. There was a coaming or a raised threshold that I had to step over in getting out of the passageway from the port side. [Ap. 208.]

My purpose in stepping from the lighted passageway on to the main deck was for general inspection of the main deck. After I stepped from the doorway I took a step and a half or maybe two steps before the accident. [Ap. 213.]

There were no lights at all near that open hatchway. I was not able to see that open hatchway by looking down. [Ap. 213.]

When I set my left foot down I turned to the right, with my left foot on the deck; and, as I turned to put my right one down, I fell in the hold. My foot did not come in contact with any object prior to my falling into the hold. [Ap. 214-215.]

(NOTE: The uncontradicted evidence in the case shows that the upper edge of the after coaming of the port bunker hatch was 8 inches above the surface of the main deck and this fact is important for the reason that when a person takes an ordinary step the sole of the shoe is not raised high enough to clear such an obstruction.)

My purpose in turning to the right as I came out of the door was to inspect for fire extinguishers and fire hose.

(NOTE: The attention of the Court is directed to the fact that there were no fire extinguishers or any fire hose which could have been inspected in the vicinity of

the route which the appellee Richardson voluntarily chose, without telling anybody aboard the vessel, or any place else, that he intended to roam around on the dark deck of a vessel under repair at a shipyard.)

Up to that point I had not seen or found anybody on the ship. [Ap. 215.]

I was on duty out here (Harbor area) 4 to 5 months before this accident happened, first going on duty at Terminal Island on February 10, 1944. During that period of time my duties called for me to go aboard and inspect ships. I was down along the waterfront there from the time I began my duties until this accident happened. During that time I boarded a considerable number of ships and made inspections similar to the inspection I intended to make the night of the accident. [Ap. 217.]

I had boarded vessels at Bethlehem shipyard on previous occasions and had gone on board vessels which were undergoing repairs. I knew that the Frank G. Drum was in the Bethlehem yard undergoing repairs the night I boarded her. I had been on board other tankers on previous occasions and I am generally familiar with the deck arrangement of a tanker. I know what a catwalk is. A catwalk is an upper walkway, about 6 feet above the main deck. The purpose of the catwalk is to walk over, to enable people to get from the after end of the ship up to the forward end of the ship without going along the main deck. That catwalk has chains or ropes alongside of it so you can walk along safely. On the deck of a tanker there are a great many pipe lines. Those pipes are large pipes that are used

in pumping oil and other commodities from one tank to the other of a tanker. They are all various sizes and get to be fairly good sized. Respondents' Exhibit A I recognize as the deck of a tanker and that is something similar to the deck of a good many tankers that I boarded when I was making an inspection. The pipes shown here are similar to the pipes that are common on the decks of tankers. That object in the center of the picture with a wheel on it is a valve. [Ap. 217-219.]

This object beside the valve is a hatch; a means of getting down into the compartment that is below the deck. I have seen these hatches on many vessels that I have boarded (maybe not in that particular place) but in various places on the decks of ships. I know that in a tanker there are a great many different compartments in which commodities are carried. [Ap. 219-220.]

There was not supposed to be a certain number of fire extinguishers aboard a ship. I didn't count the number of fire extinguishers on board. When I say fire extinguishers I mean there are several different kinds; ones you can use just by hand, carrying them around, and then there are some that stand erect, big ones. [Ap. 221-222.]

I do not recall finding any fire extinguishers when I walked through the passageway. I expected to find fire extinguishers along that bulkhead and up by the side of the catwalk. Referring to Respondents' Exhibit A, assuming that that is the forward end of the bulkhead, on the after house of the Frank G. Drum, I don't see any fire extinguishers on that

photograph or any place where fire extinguishers might have been kept. [Ap. 223.]

The ordinary way to enter the catwalk is the deck above the deck where I was. Fire extinguishers that were along the catwalk would be on the deck above where I was. [Ap. 225.]

When I was walking through the passageway of the vessel I don't remember whether I saw any fire extinguishers. It is customary to have fire extinguishers in the passageway of a vessel such as this. If there were fire extinguishers there I saw them; but I don't remember now. I don't remember if I saw any hose in the passageway. [Ap. 226-227.]

I didn't have my mind made up where I was going to proceed after I went out the opening onto the deck; no definite place; just maybe to the bow of the ship and back over to the gangplank. [Ap. 227.]

I had no prescribed or set method of going through the ship. I could go any place any time I wanted to. It was left up to my judgment as to how I would make an inspection. I didn't talk to anyone on board the ship before the accident happened. I didn't ask anybody to turn on any lights for me before I went on the deck. I didn't see anybody to tell. [Ap. 229.]

When I pushed the canvas back, the light showed just outside the door, that is, the space where I set my left foot down, the rest of it was dark. The deck itself was dark when I went on it. The only place I could see was the place where I put my first step. [Ap. 229.]

I am now receiving pay from the United States Government, approximately \$41.00 each month. [Ap. 231.]

When I entered the yard of the Bethlehem Company I had to go through a gate. I had been in that yard prior to that night on eight or ten occasions, maybe more. [Ap. 231-232.]

I remained on the premises of the Bethlehem yard up until the time I walked aboard the ship. From the gate to the place where I got on the ship I walked from 75 to 100 yards. As I approached the ship I came alongside the bow of the ship first. It was up against the dock. As I walked along that 75 yards, before getting to the ship I couldn't see the ship until I got up pretty close. When I walked up the gangway the lighting conditions I observed before I went into the passageway were a light at the gangplank and lights on the dock. The light at the gangplank was the only one I saw on any part of the forward portion of the ship when I boarded it. You couldn't see on the port side of the ship but the starboard side, by the lights from the dock, you could see. At the time I boarded the ship, the lights from the dock illuminated the starboard side of the deck and I could see plainly on that side of the deck if I wanted to walk on it. [Ap. 231-233.]

When I went down the starboard passageway I didn't stop any place before I made my turn (toward the port side.) I was walking continuously from the time I entered the forward end of the starboard passageway up until the time I stepped into the hatch. I didn't open any of the doors to any of

the quarters in the starboard passageway or along the port passageway. [Ap. 233-234.]

You find the officer's quarters up on the upper deck, the one above the main deck, most of the time. [Ap. 235.]

The manner in which I could inspect a dark place without a flashlight or some means of illumination was, up over your head, "where them fire extinguishers and fire hose would ordinarily hang, you could see up high where they were, but down below there was a shadow, and that is the way I expect I found it." I had no light with me. I do not usually carry a flashlight.

"Q. Was it your practice to roam in ships in pitch darkness? A. There wasn't many ships that was pitch black dark." [Ap. 234-235.]

From my experience in walking along tankers, I knew that I was about to run into hatches and pipes and valves and all sorts of machinery, "but you could take your time going over." When I stepped out of the port passageway I left this canvas flap closed behind me and at that time you could see lights on the dock but you couldn't even see a foot ahead of you about the surface that I intended to walk on. [Ap. 236.]

When I first stepped out I was facing forward of the ship, when I set my left foot down. Then I turned to the right. I brought my right one out of the passageway. My left foot was right where I set it down, so the only foot that I moved at all after I placed my left foot out on the deck, up to

the time I went into the hatch, was my right foot.
[Ap. 237-238.]

When I brought my right foot out the curtain closed behind me as I brought it out so that everything was dark out there on the surface of the deck as soon as it closed behind me and right then I was blinded to a certain extent. [Ap. 367.]

When I got on that particular tanker that night it appeared to me that it was a different type ship than I was used to. [Ap. 368.]

Appellee Richardson introduced in evidence certain Interrogatories directed to Appellant Tide Water Associated Oil Company, together with the Answers thereto. They are set forth in the Appendix G, pages 18-23.

From the testimony and evidence hereinabove referred to it is obvious that there is no foundation whatever in the record supporting the finding of negligence on the part of appellant, the finding of lack of negligence on the part of Bethlehem Steel Company, the finding that Bethlehem Steel Company was not in complete control of the vessel, the finding that appellant had opened the port bunker hatch, the finding that appellee Richardson was an invitee of appellant, the finding that appellant knew that appellee Richardson was coming aboard the vessel, the finding that appellee Richardson was not guilty of negligence proximately causing or contributing to his own injury, or the finding that appellee Richardson did not assume all risk of injury.

It is likewise obvious from the foregoing testimony and evidence that the trial court erred in the conclusions of law reached by the trial judge and in making and

entering a final decree against appellant and in favor of the appellees.

Appellant particularly points out the fact that appellee Richardson has at all times since his discharge from the Coast Guard been receiving a pension of \$41.00 per month based on a 30% disability and that, presumably, he received his full salary as a seaman first class from the date of the accident until the date of his discharge from the Coast Guard. Therefore the findings of the court with reference to Richardson's loss of earnings diminution in future earning capacity are and each thereof is without substantial support in the record. Richardson, according to the judgment of the trial court, will, if the judgment is affirmed, be receiving at least a partial double recovery. In any event, it cannot be contended that he has suffered a permanent loss of earning capacity based on a 30% disability without giving the appellant credit for the \$41.00 a month which Richardson has been receiving and will continue to receive from the Government. One of the reasons for awarding Richardson the pension was to compensate him for future loss of earning capacity.

There cannot be any doubt about the fact that Richardson was guilty of negligence proximately causing or at least contributing in a very substantial percentage to his injury. Therefore if any private entity was guilty of negligence proximately contributing to Richardson's injury the total sum of the damage would have to be diminished by that percentage thereof which was proximately caused or contributed to by Richardson's gross negligence.

III.

The Decree Against Appellant and in Favor of Appellee Bethlehem Steel Company Should Be Reversed.

Appellant has already set forth the essential bases upon which it is entitled to be relieved of and from all responsibility for the injury sustained by appellee Richardson. The evidence shows that Bethlehem Steel Company and the United States of America were in exclusive control of the vessel at all times while it was in the shipyard. Proctor for appellee Bethlehem Steel Company was very much concerned during the trial whenever any reference was made by proctor for appellant to the fact that the United States of America was the only entity which could have invited or permitted any person to come aboard the vessel. The testimony, written evidence, and the form of contract which it must be presumed was in full force and effect between the United States of America and Bethlehem Steel Company, illustrate very clearly the substantial basis for Mr. McHose's apprehension in this respect. Half-truths were presented by the appellee Bethlehem Steel Company to the trial judge. Appellee Bethlehem Steel Company concealed from the trial court the fact that it was acting pursuant to a contract between the United States of America and said appellee. It, at least impliedly, represented to the trial judge that the only written contract being performed by Bethlehem Steel Company, from the time the vessel was brought into the shipyard until the time of the accident, was the contract made up of a series of letters or sales orders between Bethlehem Steel Company and Tide Water Associated Oil Company. However, when a person speaks with reference to any subject, the substantive rules with reference to

fraud require such person to speak the whole truth with reference to the subject. If there is no duty to speak upon the subject at all and a party voluntarily opens a discussion of the subject matter, especially to a court, there is a legal duty to give the court all of the facts.

William A. Harrington, the assistant manager of Bethlehem Steel Company, testified that said company performed certain repair work to the tanker Frank G. Drum in July and August, 1944, and that the work was done pursuant to an *oral* agreement. [Ap. 326.] He also testified, ostensibly on the same subject and with reference to the so-called oral contract, that he got the approval of the coordinator (who could have been no one excepting an agent of the War Shipping Administration, although this was not explained to the court), for that work and had a *form* from the coordinator, dated July 21, authorizing Bethlehem Steel Company to *oversee* the repairs; that the only thing we (Bethlehem Steel Company) received from the Associated Oil Company was a form carrying the C. M. P. allotment serial number, calling for the drydocking of the vessel and some normal underwater repairs. That was then followed up by a survey for some of the owner's repairs *after* the vessel arrived in the yard. It happened that there was some damaged plates on the ship due to collisions with the Army and the Navy. [Ap. 327-328.]

The work being done for the United States of America was done simultaneously to doing the owner's repairs and the cost of doing those repairs was billed separately to the War Shipping Administration. [Ap. 330-331.]

The contract between Bethlehem Steel Company and Tide Water Associated Oil Company, according to Har-

rington, was not the contract pursuant to which the Frank G. Drum came into the Bethlehem Steel Company yard but that the Frank G. Drum was already in the yard when the contract was made. [Ap. 331-332.]

Conclusion.

It is respectfully contended that the appellant has sustained its burden of demonstrating that the final decree entered in favor of appellees Richardson and Bethlehem Steel Company and against appellant Tide Water Associated Oil Company was a miscarriage of justice and that this Honorable Court, in the exercise of its powers as an appellate court and as a court empowered to consider all of the facts on a trial *de novo*, should make and enter a final decree in favor of appellant Tide Water Associated Oil Company and to dispose of the issues as between the appellees Richardson and Bethlehem Steel Company, as the facts and law applicable thereto require.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellant.

APPENDIX A.

"A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner's business thereon. Accordingly the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property is not liable for injuries to licensees due to the condition of the property, or, as it has been expressed, due to passive negligence or acts of omission. A fortiori, if licensees choose to make use of property although there is open and obvious danger thereon, the owner cannot be held liable for injury to a licensee because of such danger. It has been said, however, that the owner is under a duty not to expose a licensee to perils which could be avoided by

the exercise of reasonable care. The owner has been held not liable for injuries which a mere licensee on his property has received from excavations, a trench, a ditch, a cistern, a hole in the ground, an uncovered coalhole, a steam pit, a drain used to carry away hot water, a vat of hot water, elevators, unguarded or insufficiently guarded elevator shafts, floor openings, a hole in a bridge, an opening in the platform of a fire escape, uninsulated or insufficiently insulated electric wires, stairways, scantlings or pieces of timber on the floor of a hall of an office building, lack of light in a tenement house hallway, a pile of lumber, a heap of stones, a derrick, a moving crane, log rollways, a defective farm crossing over a railroad, a defect in the roof of a barn, a wire stretched across the outer edge of a lawn to keep off trespassers, a barbed wire fence along the boundary of the premises, the fall of a gravestone in a cemetery, a fire on the premises, an explosion of gas, the breaking of a machinery belt, or failure of a servant of the owner to use reasonable care in throwing a bale of hay from a loft."

45 Corpus Juris, 798-802, Sec. 203.

APPENDIX B.

“ . . . The plaintiff had alleged that the defendant had removed the supports and the defendant in his answer admitted that he had removed the support. As to this defendant the claim of negligence on his part is that he did not warn the plaintiff. But he was not bound to warn him of an obvious danger. (*Shanley v. American Olive Co.*, 185 Cal. 552, 555 (197 Pac. 793).) In other words, as we understand the plaintiff it is his contention that if the defendant or his employees removed the supports, and allowed him to enter without being warned, then the defendant was negligent. He cites many authorities to the effect that the plaintiff was an invitee, and that the defendant owed to him the duty of exercising ordinary care. Conceding, but not deciding, both propositions to be sound, they do not by any means determine the case. The argument of the plaintiff assumes that reasonable care to be exercised by the defendant of a building undergoing alterations and repairs is the same as reasonable care on a building that is entirely completed. As one of its instructions the trial court properly stated to the jury, among other things, ‘Negligence is not absolute, but is a relative matter, depending upon time, place, persons, and circumstances.’ The argument of the plaintiff entirely ignores that factor. In *Doremus v. Auerbach et al.*, 176 App. Div. 512, 163 N. Y. Supp. 239, at page 242, the court said: ‘The fact that the building and the stairway were evidently in process of construction charges those concerned in its construction with a very different degree of care from that which attaches to the owner of a completed building . . .’ In the case of *Cole v. L. D. Willcutt & Sons Co.*, 218 Mass. 71 (105 N. E. 461, at page 462), the court said: ‘But the plaintiff contends

that the defendant had invited them to use the stairs, and so owed him a duty to keep them in safe condition for his use. If there was such an invitation, it was merely to use them in the condition in which they were with whatever work was openly and plainly being done upon them.' In *Gainey v. Peabody et al.*, 213 Mass. 229 (100 N. E. 336), the court said: 'The mere existence of a hole in the floor of a building in process of construction is in itself no evidence of negligence. It is one of the conditions which, apart from statutory obligation to guard, must be anticipated by anybody working there.' In the case of *Holland v. Turner*, 189 App. Div. 566 (178 N. Y. Supp. 382), the court was considering a case brought by an injured workman. He was working on a building under repair. The carpenters had torn up the floor in two different places. In one place the side supports had been removed. The plaintiff attempted to cross on the joists but one of the joists tipped over and he suffered the injury. On page 383 (of 178 N. Y. Supp.) the court said: 'Instead of taking this safe path, he chose to make a short cut, and pass over joists from which the flooring had been taken up, and from which the side supports had been taken away. I can find no evidence of negligence on the part of the defendant, and abundant evidence of contributory negligence on the part of the plaintiff. If this were the only pathway to the head of the stairs, and persons had occasion to go up and down the stairs, a different question might be presented; but defendant was proceeding to do just what he was engaged to do, taking down these joists in order that he

might replace the stairway in a different position.' In the case of *M. A. Long Co. v. State Acc. Fund*, 156 Md. 639 (144 Atl. 775), the court was considering an accident which occurred in a building under the course of construction. One of the workmen stepped on a joist that had certain knots in it. It broke and he was injured. On page 780 (of 144 Atl.) the court said: 'The question in this case, therefore, in the final analysis, depends upon whether the appellant did or left undone anything which resulted in injury to Lappielly, which the average careful and prudent man would not have done or left undone under such circumstances. If the average prudent and careful man would have done what the appellant did in this case, there is no actionable negligence on the part of the appellant, even though an accident occurred which resulted in Lappielly's injury.' Continuing on page 781 (of 144 Atl.) the court quoted with approval: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, *not of danger but of negligence*, and the unbending test of negligence in methods, machinery, and appliances is the *ordinary usage of the business*. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the standard of the average prudent man" *Lentz v. Allentown Bobbin Works*, 291 Pa. 526 (140 Atl. 541), is helpful. The plaintiff took a contract to repair the defendant's roof. In doing his work he leaned on one of the boards, it broke, and he fell to the ground and was injured. The break disclosed that the board was rotten, a fact not previously

known to plaintiff or defendant, and so far as appears not discoverable by any superficial examination. At page 542 (of 140 Atl.) the court said: 'The mere breaking of the board did not prove negligence (citing cases) and beyond that nothing was shown, except the condition of the board disclosed by the break. To hold the employer or property owner liable under such circumstances would place upon him an unreasonable burden which the law does not do. He is only required to use ordinary care to protect those lawfully upon his premises. (Citing cases.) This degree of care does not place upon the property owner the practically impossible task of testing every roof board before removal of the old covering to make way for the new.' In *Shanley v. American Olive Co.*, 185 Cal. 552, 555 (197 Pac. 793), the court said: 'The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. (29 Cyc. 471; 26 Cyc. 1213.)"

Ambrose v. Allen, 113 Cal. App. at 113-115.

APPENDIX C.

“Plaintiff relies for reversal of the judgment in favor of defendant P. J. Walker Company and Owens-Illinois Pacific Coast Company upon the proposition that *the foregoing facts disclose that said defendants were negligent in maintaining the roof on the building above described, in that the corrugated iron roofing adjacent to and below the corrugated glass roofing which formed the skylight was not fastened at its upper end in any manner and that as a result thereof when plaintiff stepped upon it it pulled away from the purlin and permitted him to fall to the floor of the building.*

“This proposition is untenable. The rule is established in California that an invitee to an incompleated building in process of construction is invited to use such building in its then condition. In *Ambrose v. Allen*, 113 Cal. App. 107 (98 Pac. 169), a case where the facts were analogous to those in the present case, after an exhaustive review of the authorities from other jurisdictions Mr. Justice Sturtevant at page 113 quoting from *Cole v. L. D. Willcutt & Sons Co.*, 218 Mass. 71 (105 N. E. 461, 462) thus states the rule: ‘. . . But the plaintiff contends that the defendant had invited him to use the stairs, and so owed him a duty to keep them in safe condition for his use. If there was such an invitation, it was merely to use them in the condition in which they were with whatever work was openly and plainly being done upon them.’

“Since the authorities supporting the rule just mentioned and the reasons therefore (*sic*) are fully set forth in *Ambrose v. Allen, supra*, it is unnecessary for us to further discuss this subject. Suffice it to say that under the rule above stated plaintiff has failed to show any actionable negligence upon the part of defendant P. J. Walker and Owens-Illinois Pacific Coast Company.”

Kolburn v. P. J. Walker Co., 38 Cal. App. (2d)
545 at 549.

APPENDIX D.

“Whether the railroad companies may be held liable for Hunter’s act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work or that of another, a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited. In *Standard Oil Co. v. Anderson*, 212 U. S. 215, 220-225, this court said:

“The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

“To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.

* * * * *

“In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.’”

Denton v. Yazoo & M. V. R. R. Co., 284 U. S.
305 at 308-309.

APPENDIX E.

“Commissioned, warrant, and petty officers of the Coast Guard are hereby empowered to make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas, and the navigable waters of the United States, its Territories, and possessions, except the Philippine Islands, for the prevention, detection, and suppression of violations of laws of the United States. For *such* purposes, such *officers* are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship’s documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance. . . .”

Title 14 U. S. C. A., Sec. 45.

Sections 46, 47 and 48 of the same title read as follows:

“The officers of the United States Coast Guard, insofar as they are engaged, pursuant to the authority contained in section 45 of this section, in enforcing any law of the United States, shall—

(a) Be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(b) Be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.”

14 U. S. C. A., Sec. 46.

“The provisions of sections 45 and 46 of this title shall be in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers or any other officers of the United States.”

14 U. S. C. A., Title Sec. 47.

“Any officer of the Coast Guard enumerated in section 45 of this title may be designated by the Commandant of the Coast Guard as captain of the port for such port or ports or adjacent navigable waters of the United States as he deems necessary to facilitate execution of the duties prescribed by sections 45-48 of this title.”

14 U. S. C. A., Sec. 48.

APPENDIX F.

“ARTICLE 1. *Purpose.* The purpose of this contract is to establish the terms upon which the Contractor will provide berthing, drydocking, marine railway, shipyard, and other facilities, together with materials and services for effecting expeditious repairs, completion, alterations of and additions to merchant vessels of United States and other registry and portions thereof which may be ordered to the Contractor’s plant or another location for the performance of work hereunder from time to time during the period of this contract.

ARTICLE 2. *Preliminary arrangements.* Whenever the Administrator desires the Contractor to effect the repair, completion, alteration of or addition to a merchant vessel of United States or other registry, the Administrator shall notify the Contractor of the nature of the work to be performed, the date proposed for delivery of the vessel to the Contractor, and the desired date for completion of the work by the contractor. Upon being so notified, the Contractor shall promptly advise the Administrator regarding its ability to accept the vessel and to perform the work as required. If satisfactory dates for commencing and completing the work are agreed upon, the Contractor shall make the necessary arrangements for receiving the vessel on the agreed date, and for berthing her alongside its wharves or in its drydock or on its marine railway, or in the vicinity of its plant, or other location where the work is to be performed, as required, such arrangements to be satisfactory in each case to the Repair Representative.

“ARTICLE 3. *Job orders.* As soon as practical after the arrival of the vessel at the Contractor’s plant or in

the vicinity thereof or other location where the work is to be performed, the items of work which it is desired to accomplish on such vessel shall be inspected jointly by the Contractor and the Repair Representative and job orders setting forth the items of work to be accomplished shall be prepared by the Repair Representative. If inspection requires the opening up of machinery and equipment and its closing after inspection, a job order shall be prepared covering that work. Items of repair shall be set forth in separate job orders from those setting forth items of alteration, completion or addition and each job order shall specify in reasonable detail the repair or completion, alteration or addition necessary to be accomplished on an individual item. When a job order is agreed upon, it shall be signed by an officer or other authorized representative of the Contractor and by the Repair Representative. If additional work is to be done on such vessel, additional job orders shall be prepared and executed as provided in this Article.

“ARTICLE 4. *Performance.* (a) Upon the signing of a job order, the Contractor shall promptly commence the work specified therein and diligently prosecute the same to completion to the satisfaction of the Repair Representative.

“(b) The Contractor shall furnish electricity, compressed air, steam, fresh water, and flushing water to the ships as required by the Repair Representative and shall furnish for the use of maritime personnel tools and equipment, including falls, stage planking, cranes, scrapers, hose, paint pots and brushes as required by the Repair Representative in such quantities as required.”

Standard Contract Forms of War Shipping Administration pp. 433-434.

“ARTICLE 8. *Entering and Leaving Dry Dock.* (a) The decision as to whether the vessel shall be docked at the appointed time shall rest solely with the commander of the vessel. The commander of the vessel shall approach the dry dock or marine railway in a fair manner and at a reasonable speed. The commander of a vessel under its own power shall have immediate charge of the vessel until the bow thereof reaches the dry dock sill or the entrance to the marine railway. The dock master shall then take charge and complete the docking, being assisted as necessary by the ship's forces until the vessel has been safely docked. In undocking, the dock master shall have charge until the bow of the vessel clears the dry dock sill or the entrance to the marine railway.

“(b) The Contractor shall have charge of a vessel not operating under its own power from the time the Contractor's or subcontractor's lines are secured to the vessel until such time as all Contractor's or subcontractor's lines are cast off.”

Standard Contract Forms of War Shipping Administration p. 441.

“ARTICLE 9. *Plans, specifications, and manner of doing work.*

* * * * *

“(e) The Contractor shall exercise reasonable care to protect the vessel from fire under the prevailing circumstances. To this end the Contractor shall maintain a reasonable system of inspection over the activities of welders, burners, riveters, painters, plumbers and similar workers, particularly where such activities are undertaken in the vicinity of the vessel's magazines, fuel oil tanks or storerooms containing inflammable materials. Hose

lines shall be maintained in such number and as required by the Repair Representative between the vessel and the shore ready for immediate use at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on marine railway. All tanks under alteration or repair shall be cleaned, washed and steamed out by the Contractor as may be necessary and the Repair Representative shall be furnished with a gas-free certificate before any work is done on a tank. The Contractor shall maintain a fire watch on the vessel at all times which shall be satisfactory to the Repair Representative.

“(f) The Contractor shall place proper safeguards for the prevention of accidents, and shall put up and keep at night suitable and sufficient lights where necessary during the prosecution of the work and use its best efforts to prevent accidents or injury to persons or property.”

Standard Contract Forms of War Shipping Administration pp. 442-443.

* * * * *

“(m) The Contractor shall indemnify and save harmless the Government and its agencies and instrumentalities, the vessel and the owner of the vessel, from all suits or actions and damages or costs of every name and description to which the Government and its agencies and instrumentalities, the vessel or the owner thereof may be subject or put by reason of injury (including death) to the person or property of another arising or growing out of the fault or negligence of the Contractor or any subcontractor, its or their servants, agents or employees.”

Standard Contract Forms of War Shipping Administration p. 444.

“ARTICLE 22. *Plant protection.* (a) In addition to taking the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plant and work, the Contractor shall provide, as may be required or approved by the Contracting Officer, special plant protection such as additional equipment, devices and watchmen for the protection of its plant and property and the work in process for the Government against espionage, sabotage or enemy action.

“(b) When directed by the Repair Representative, the Contractor shall deliver to the Repair Representative a list of items of additional plant protection deemed necessary for adequate plant protection, together with an estimate of the cost thereof. Such items of additional plant protection shall be those required by the circumstances under which this contract is being performed and must be directed against espionage, acts of war and acts of enemy aliens. The Contractor must provide without charge protection against the elements, including storms and high water, and take the precautions usually taken as prudent measures in shipbuilding or manufacturing plants against fire, theft, and other risks such as occur in the ordinary conduct of business.”

Standard Contract Forms of War Shipping Administration p. 449.

APPENDIX G.

Interrogatory No. 1. Were the members of the standby crew employes of and paid by the Tide Water Associated Oil Company?

Answer No. 1. The members of the crew aboard the vessel were there merely as a security watch. These members of the crew were paid by Tide Water Associated Oil Company, a corporation.

Interrogatory No. 2. What is the name, rank, or rating at the time of the accident, and last known address of each member of the standby crew?

Answer No. 2. The name, last known address, rank and rating of the members of the security watch aboard at the time of the accident are: Asa H. Humble, 3rd Mate, 3660—47th St., San Diego, California; J. J. Schleef, Chief Engineer, 1275—12th Avenue, San Francisco, California; B. Bisnagno, Bos'n, Fort Jones, California.

Interrogatory No. 3. Which of the persons mentioned in question 2 were actually on duty aboard the SS Frank G. Drum at 2100 on August 6, 1944?

Answer No. 3. See answer to number 2.

Interrogatory No. 4. Who was the Captain of the SS Frank G. Drum on August 6, 1944, and what is his last known address?

Answer No. 4. O. Bengston, 1940 Anza Street, San Francisco, California.

Interrogatory No. 5. Who was in command of the SS Frank G. Drum on August 6, 1944?

Answer No. 5. The vessel was withdrawn from navigation.

Interrogatory No. 6. What were the duties of each individual member of the standby crew while the SS Frank G. Drum was at the Bethlehem Steel Company's repair yards?

Answer No. 6. To act as security watch.

Interrogatory No. 7. Were any members of the standby crew to inspect the ship for any reason while it was in a repair status?

Answer No. 7. The vessel had been delivered to the Bethlehem Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same.

Interrogatory No. 8. If the answer to the preceding question is "No," then, who was to inspect the vessel for fire hazards, leaks, sabotage, etc.?

Answer No. 8. There were no fire hazards aboard the vessel. All machinery was shut down. The hull was in good condition.

Interrogatory No. 11. Was the nature of the repairs being made on the SS Frank G. Drum such that the bunker hatch into which Richardson fell had to be uncovered on the evening of August 6, 1944?

Answer No. 11. Employees of the shipyard are the only ones who can tell the nature of repairs or why the bunker hatch was uncovered.

Interrogatory No. 13. Why was the bunker hatch into which Richardson fell open and uncovered at 2100 on August 6, 1944?

Answer No. 13. This question can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of this respondent.

Interrogatory No. 17. Was it customary for the ship's crew to leave a bunker hatch uncovered, unlighted, unguarded, and not roped off at night?

Answer No. 17. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the bunker hatch while the vessel was in the shipyard for inspection and repair.

Interrogatory No. 18. Were there any fixed lights on the SS Frank G. Drum that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell?

Answer No. 18. No.

Interrogatory No. 19. Did the ship have any portable lights that could have been used for this purpose?

Answer No. 19. No.

Interrogatory No. 20. If the answer to the preceding question is "No," were such lights available at the Bethlehem Steel Company's repair yards?

Answer No. 20. This respondent does not know.

Interrogatory No. 21. Where were the members of the standby crew at the time the accident in question occurred?

Answer No. 21. Chief Engineer Schleef was standing on the starboard side of the poop deck. Bos'n Bisango was in the same place. Asa H. Humble, 3rd Mate, was in his quarters.

Interrogatory No. 22. Was there any requirement or regulation in effect on August 6, 1944, that some member

of the ship's crew should be stationed at or near the gang plank at all times?

Answer No. 22. Not that this respondent know of.

Interrogatory No. 23. Was there a member of the ship's crew stationed at or near the gang plank at 2105 on August 6, 1944?

Answer No. 23. No; excepting the two who were on the poop deck.

Interrogatory No. 24. Did the Tide Water Associated Oil Company know that the SS Frank G. Drum would be inspected by the United States Coast Guard while she was tied up at the repair docks?

Answer No. 24. The Tide Water Associated Oil Company knew that the statutes of the United States permitted certain designated persons in the Coast Guard to board the vessel any time such persons were ordered to do so by the proper authorities but has no information with reference to when such persons would board the vessel.

Interrogatory No. 25. If the answer to the preceding question is "Yes," did the Tidewater Associated Oil Company know that in making such inspections the Coast Guardsmen making the inspection could inspect the entire ship from stem to stern?

Answer No. 25. Tide Water Associated Oil Company had no power to restrain the Coast Guard from doing anything it undertook but would naturally expect any per-

son to use the usual and ordinary means furnished for moving from one part of the vessel to another.

Interrogatory No. 26. Had the members of the stand-by crew been told that the United States Coast Guard might inspect the SS Frank G. Drum while it was tied up at the repair docks?

Answer No. 26. No member of the security watch has so stated; therefore this respondent does not know.

Interrogatory No. 27. Had the SS Frank G. Drum ever been inspected by any members of the United States Coast Guard during the war prior to this accident?

Answer No. 27. Respondent assumes so but has no actual knowledge thereof.

Interrogatory No. 28. If the answer to the preceding question is "Yes," had these inspections always been made by a Coast Guardsman of at least petty officer rating or by a detail under the immediate command of a Coast Guardsman of such rating?

Answer No. 28. Respondent does not know.

Interrogatory No. 29. Had the members of the ship's crew ever been told that a Coast Guardsman with a rating lower than petty officer was not authorized to board the vessel alone?

Answer No. 29. Respondent does not know.

Interrogatory No. 30. Did the Tide Water Associated Oil Company ever challenge the right of a Coast Guards-

man of less than petty officer rating to board the SS Frank G. Drum?

Answer No. 30. Respondent does not know what employees of this respondent may have done.

Interrogatory No. 31. Did the Tide Water Associated Oil Company ever take any steps to keep Coast Guardsmen of less than petty officer rating off the SS Frank G. Drum?

Answer No. 31. Respondent does not know what any employees of respondent may have done in this respect.

Interrogatory No. 32. Did the Tide Water Associated Oil Company ever protest to the Coast Guard authorities about Coast Guardsmen of less than petty officer rating boarding the SS Frank G. Drum unaccompanied by commissioned or petty officers. If so, please give the details.

Answer No. 32. No.

Interrogatory No. 33. Did a member of the ship's crew make a report of this accident to the Tide Water Associated Oil Company? If so, who?

Answer No. 33. The Master.

APPENDIX H.

ASSIGNMENTS OF ERROR.

Now comes the Respondent Tide Water Associated Oil Company, a corporation, and hereby assigns the following errors in the above entitled proceeding:

I.

The Court erred in finding that at all times mentioned in the libel Tide Water Associated Oil Company was in charge and control of and operating under time charter to the United States the tank vessel Frank G. Drum.

II.

The Court erred in finding that on August 6, 1944, the libelant was patrolling vessels located on navigable waters of the United States, including the Frank G. Drum.

III.

The Court erred in finding that libelant's duties included attending on board certain ships, including the Frank G. Drum, to inspect conditions thereon and make certain that port security regulations in effect were being observed and maintained.

IV.

The Court erred in finding that the respondent Tide Water Associated Oil Company knew that members of the United States Coast Guard would make such inspections of vessels, including the tank vessel Frank G. Drum at Los Angeles Harbor during the times mentioned in the libel.

V.

The Court erred in finding that at or about 9:10 p. m. on Sunday, August 6, 1944, libelant went on board the Frank G. Drum as a member of the United States Coast

Guard, pursuant to orders from his superior officers and in line with his duties, for the purpose of making such inspection.

VI.

The Court erred in finding that the contract for repairs was not a contract of bailment and that during the making of said repairs by Bethlehem Steel Company and while the vessel was at the repair yard, officers and members of the crew of the Frank G. Drum employed by Tide Water Associated Oil Company, remained on board, in charge and control of said vessel and engaged in various work and labor and maintenance simultaneously with the performance of repair work and labor by Bethlehem Steel Company.

VII.

The Court erred in finding that officers and members of the crew in control and charge of the Frank G. Drum and who were employees of Tide Water Associated Oil Company observed and knew that the port bunker hatch was open after the Bethlehem Steel Company ceased work on Saturday, August 5, 1944.

VIII.

The Court erred in finding that with the knowledge and approval of Tide Water Associated Oil Company's employees, on board and in charge of the Frank G. Drum, said port bunker hatch remained open the remainder of that day and night and all day Sunday, August 6, 1944, and until the time of the accident and injury to libelant at or about 9:10 p. m. August 6, 1944.

IX.

The Court erred in finding that at the time and place of the happening of the accident, Tide Water Associated

Oil Company knowingly, negligently, carelessly, and recklessly operated, conducted, controlled and maintained that portion of the Frank G. Drum on which the port bunker hatch was located, in that officers and members of the crew in charge of said vessel knowingly, negligently, carelessly and recklessly caused, maintained and permitted the said port bunker hatch to remain open, unguarded and in a dark condition without any illumination whatever to warn people, and particularly libelant, on board said ship that said hatch was in said open, unguarded, and unlighted condition, all of which was known to officers and members of the crew employed by Tide Water Associated Oil Company.

X.

The Court erred in finding that the accident and injury to libelant was solely and proximately due to the fault, negligence, and carelessness of Tide Water Associated Oil Company.

XI.

The Court erred in finding that "Tide Water Associated Oil Company was at fault and was careless and negligent at the time of the happening of the accident and injury to libelant in the following particulars:

"(a) That at the times mentioned in the libel and for a period of approximately thirty hours prior to the happening of the accident, it permitted the hatch, approximately four feet by six feet in size, leading to the port bunker tank of said ship, which bunker tank was approximately 36 feet in depth, to remain open and unguarded.

"(b) That at the times mentioned in the libel it permitted the hatch to the port bunker tank of said ship to remain in a dark and unlighted condition.

“(c) That it failed and neglected to have or place illuminated signs or any signs or notices whatever to warn people, including libelant, on or about said ship that said hatch was open, unguarded and unlighted.

“(d) That there were no precautions taken by Tide Water Associated Oil Company to warn or advise people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted

“(e) That Tide Water Associated Oil Company, having knowledge of the open, unguarded, and unlighted condition of said hatch, failed and neglected to have any person at or near said open, unguarded, and unlighted hatch to inform people, including libelant, that the same was open, unguarded, and unguarded, and unlighted.

“(f) That Tide Water Associated Oil Company knew that said vessel would be inspected by a member of the United States Coast Guard such as libelant, and notwithstanding such knowledge permitted said hatch to remain open, unguarded, and unlighted.”

XII.

The Court erred in finding that at the time of the occurrence of the injury to libelant the Frank G. Drum and the port bunker hatch thereon, were in charge or control of Tide Water Associated Oil Company, and were not in charge or control of Bethlehem Steel Company.

XIII.

The Court erred in finding that at the time of the happening of the accident and injury libelant was aboard the Frank G. Drum as an invitee of Tide Water Associated Oil Company.

XIV.

The Court erred in finding that Tide Water Associated Oil Company, with knowledge of the existence of the dangerous condition of the port bunker hatch referred to in the libel, invited and permitted libelant to board said vessel for the purpose of making the inspection above referred to and that libelant while making said inspection and due to the negligence, carelessness and recklessness of Tide Water Associated Oil Company, did fall into said open hatch a distance of approximately 36 feet to the bottom of said port bunker tank, thereby damaging and injuring the libelant.

XV.

The Court erred in finding that as a result of the negligence of Tide Water Associated Oil Company libelant was hurt in his health, strength and activity, received a profound shock to his nervous system, and was made sick, sore and lame and was hurt about his head, limbs and body, and did receive a severe fracture of the femur causing permanent disability and from said injuries libelant suffered great physical pain and mental anguish, and has had pain and suffering in the past and will have pain and suffering in the future, all to his damage in the sum of \$15,000.00.

XVI.

The Court erred in finding that libelant, due to said injuries, will suffer a permanent partial disability which has caused a loss in his earning capacity since his discharge from the United States Coast Guard, and will cause a permanent partial loss in his future earning capacity, all to libelant's further damage in the sum of \$14,400.00.

XVII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were the result of an inevitable or unavoidable accident.

XVIII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by the libelant by reason thereof, were caused or resulted by reason of any negligence of libelant.

XIX

The Court erred in finding that it is untrue that the accident, or the risk or the danger incident to the work in which libelant was engaged, or the risk or damage incident to the manner in which libelant was performing said work, or the risk or danger then existing at the place of the accident, including the risk or danger of personal injury of a nature or in the manner suffered by libelant, were open or obvious or apparent or well known to libelant, or a man of his experience or calling.

XX.

The Court erred in finding that it is untrue that libelant carelessly or negligently or recklessly or voluntarily placed himself in a position where he was exposed to the risk of danger and injury of the nature that occurred to libelant.

XXI.

The Court erred in finding that it is untrue that libelant was negligent in or about the premises.

XXII.

The Court erred in finding that it is untrue that the injuries suffered by libelant were solely or proximately or

in any degree whatever caused by recklessness or carelessness or negligence on the part of libelant.

XXIII.

The Court erred in finding that it is untrue that libelant was guilty of any contributory negligence or recklessness or carelessness.

XXIV.

The Court erred in finding that it is untrue that libelant assumed any risk or danger or the risk or danger of the injuries suffered by libelant.

XXV.

The Court erred in finding that it is untrue that at all or any times mentioned in the libel, the sole and exclusive right to control the operation of the Frank G. Drum was the prerogative of the United States or the Administrator, War Shipping Administration.

XXVI.

The Court erred in finding that at all times mentioned in the libel the Frank G. Drum was operated and controlled by and in charge of its owner, Tide Water Associated Oil Company.

XXVII.

The Court erred in finding that at the time of the accident and injury to libelant the Bethlehem Steel Company owed no duty to Tide Water Associated Oil Company or to any other person or concern to have or maintain any representative or employee on board said vessel.

XXVIII.

The Court erred in finding that any ship's light which would have illuminated the port bunker hatch was available to the officers or crew on board the Frank G. Drum or

could have been controlled by the officers and crew and those on board the Frank G. Drum.

XXIX.

The Court erred in finding that Bethlehem Steel Company did not have charge or control of the Frank G. Drum or of the port bunker hatch thereon, at the time of the injury to libelant.

XXX.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company was negligent in any way in connection with the performance by it of repair work on the Frank G. Drum pursuant to the contract of repair with Tide Water Associated Oil Company.

XXXI.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company or its employees were responsible for leaving the port bunker hatch open and unguarded and unlighted at the time of the injury to libelant.

XXXII.

The Court erred in finding that even if the evidence established that Bethlehem Steel Company or its employees did leave the hatch open and unguarded when work in the port bunker tank ceased on Saturday afternoon, August 5th, this did not create a dangerous condition during daylight, and the condition only became dangerous after it became dark by reason of failure by Tide Water Associated Oil Company to provide lights at the port bunker hatch or give any warning of the dangerous condition there existing.

XXXIII.

The Court erred in finding that lighting the portion of the ship around the port bunker hatch was within the control of and the duty of Tide Water Associated Oil Company, and not Bethlehem Steel Company.

XXXIV.

The Court erred in finding that even if it should be found that Bethlehem Steel Company was negligent in leaving the port bunker hatch open and unguarded when work ceased Saturday afternoon, August 5th, such negligence would not have been the proximate cause, but could only have been a secondary cause of the injury to libelant.

XXXV.

The Court erred in concluding from the findings of fact that at the time and place of the accident and injury to libelant, Tide Water Associated Oil Company was the owner and operator of and in full control and charge of the Frank G. Drum and the port bunker hatch thereon.

XXXVI.

The Court erred in concluding from the findings of fact that libelant, David Lawton Richardson, committed no fault or negligence in the premises.

XXXVII.

The Court erred in concluding from the findings of fact that libelant was on board the Frank G. Drum with the knowledge and consent of the owner, Tide Water Associated Oil Company, and at the time and place of the accident was an invitee of Tide Water Associated Oil Company.

XXXVIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company was not a bailee of the Frank G. Drum at the time of the accident and injury to libelant.

XXXIX.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it knowingly permitted the port bunker hatch to remain open and unguarded at the time and place when and where libelant was injured.

XL.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition at the time and place when and where libelant was injured.

XLI.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition, and failed to warn libelant that such dangerous condition existed.

XLII.

The Court erred in concluding from the findings of fact that the negligence of Tide Water Associated Oil Company was the sole and proximate cause of the accident and injury sustained by libelant.

XLIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company committed no fault or negligence in the premises and that even if the Court found Bethlehem Steel Company to have been negligent in leaving the port bunker hatch open when it ceased work on Saturday, August 5th, the Court concludes such negligence could not have been the primary or proximate cause of the accident and injury sustained by libelant, but could only have been a secondary cause, the primary cause being the negligence of Tide Water Associated Oil Company.

XLIV.

The Court erred in concluding from the findings of fact that the libel against Tide Water Associated Oil Company shall be sustained, and that libelant shall be granted a final decree solely against respondent Tide Water Associated Oil Company for damages in the total sum of \$29,400.00, and for libelant's costs of suit herein.

XLV.

The Court erred in concluding from the findings of fact that the libel against Bethlehem Steel Company shall be dismissed and Bethlehem Steel Company shall recover from Tide Water Associated Oil Company its costs of suit herein.

XLVI.

The Court erred in failing to make a finding on the disputed allegation in Article Tenth of the Libel, that libelant's duties at said time and place as a member of the United States Coast Guard were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and ships at said

Bethlehem Steel Company and that at said time and place the respondents knew or in the exercise of ordinary care should have known all of the duties of libelant as above set forth.

XLVII.

The Court erred in failing to find with reference to the disputed allegation in Article Eleventh of the Libel that at about the hour of 9:10 p. m. on August 6, 1944, libelant entered said ship, SS Frank G. Drum, for the purpose of inspecting said ship for the benefit of the respondents.

XLVIII.

The Court erred in failing to find on the disputed allegation that the respondents (which includes Bethlehem Steel Company) knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained the SS Frank G. Drum and knowingly, negligently, carelessly, recklessly and unlawfully caused, maintained and permitted the hatch to the bunker of said ship to remain open and unguarded and in a dark condition without any illumination whatever to warn people on said ship that said hatch was in said condition and that all thereof was well known to the respondent Bethlehem Steel Company.

XLIX.

The Court erred in failing to find with reference to the disputed allegations in Article Twelfth that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondent Bethlehem Steel Company, in the following particulars:

(a) At all times herein mentioned, the hatch to the bunker tank of said ship, which was approximately thirty-five (35) feet in depth, remained open and unguarded.

(b) At all times herein mentioned the hatch to the bunker tank of said ship was and remained in a dark condition without any illumination whatever.

(c) There were no illuminating signs or signs whatever to warn people on or about said ship that said hatch was open and unguarded.

(d) There were no precautions taken by respondent Bethlehem Steel Company to warn or let people on or about said ship know that said hatch was open and unguarded.

(e) Respondent Bethlehem Steel Company failed and neglected to have any person at or near said unguarded hatch to inform people at or near said hatch that the same was open and unguarded.

(f) That the respondent Bethlehem Steel Company permitted said hatch to remain open, unguarded and in a dark condition, all of which constituted a trap for people on said ship at or near said hatch.

(g) Respondent Bethlehem Steel Company knew that said ship would be inspected by a member of the United States Coast Guard and notwithstanding such knowledge permitted said hatch to remain unguarded and in a dark condition.

L.

The Court erred in failing to make any finding with respect to the disputed allegation in Article Thirteenth of the Libel that notwithstanding the knowledge and existence of the dangerous condition of the ship and the hatch thereon the respondent Bethlehem Steel Company invited and permitted libelant onto said ship for the purpose of making the inspection referred to in the libel.

LI.

The Court erred in failing to find on the disputed allegation in the Thirteenth Article that the respondent Tide Water Associated Oil Company invited and permitted the libelant onto the ship for the purpose of making the inspection referred to in the Tenth and Eleventh Articles and that the libelant while making such inspection did fall into the open hatch.

LII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of the Answer of Tide Water Associated Oil Company that at all times referred to in the libel the said vessel was under requisition charter to the United States of America and that at all times mentioned in the libel said vessel had been withdrawn from navigation.

LIII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of Tide Water Associated Oil Company's Answer that the said vessel, at all times mentioned in the libel, was an ocean vessel under the Flag or control of the United States and that the sole and exclusive right to control the operation, charter, requisition or use thereof was the prerogative of the Administrator, War Shipping Administration, as provided in and by Executive Order No. 9054, 7 Federal Register, 837, as amended by Executive Order No. 9244, 7 Federal Register, 7327, and that at none of the times or places referred to in the libel did said respondent have the right to control the operation or charter or requisition or use of said vessel.

LIV.

The Court erred in failing to make any finding with respect to the allegations of the Third Affirmative Defense of Tide Water Associated Oil Company that at all times referred to in the libel, libelant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions being employed and used aboard vessels of the type of the SS Frank G. Drum.

LV.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Second Affirmative Defense.

LVI.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Third Affirmative Defense.

LVII.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Fourth Affirmative Defense.

LVIII.

The Court erred in failing to make any finding with reference to the disputed question whether the libelant was or was not an invitee of the Tide Water Associated Oil Company at the specific part of and location on the ship where the accident happened.

LVIX.

The Court erred in failing to make any finding with reference to whose servants, agents or employees removed the rope guards which were around the port bunker tank at the time the vessel was brought to the shipyard of Bethlehem Steel Company and whose servants, agents and employees removed the port bunker hatch cover from its supporting stiff-leg and arranged it so that it was in the position it occupied at the time of the accident.

LX.

The Court erred in failing to conclude that the libelant is not entitled to recover any sum whatever from the respondent Tide Water Associated Oil Company and that the libel should be dismissed with costs to said respondent Tide Water Associated Oil Company.

LXI.

The Court erred in failing to find that Bethlehem Steel Company was guilty of negligence proximately causing or proximately contributing to the injuries sustained by the libelant.

LXII.

The Court erred in making Final Decree in favor of libelant and Bethlehem Steel Company and against Tide Water Associated Oil Company.

LXIII.

The Court erred in ordering the libel against the respondent Bethlehem Steel Company dismissed.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

APPENDIX I.

RESPONDENT TIDE WATER ASSOCIATED OIL COMPANY,
a corporation's EXCEPTIONS TO LIBEL IN PERSONAM.

Comes now the respondent, Tide Water Associated Oil Company, a corporation, and excepts to the libel herein as follows:

I.

Excepts to the sufficiency of the said libel upon the ground that it fails to allege any facts showing that the relationship of invitor and invitee existed between said respondent and the libellant.

II.

Excepts to the sufficiency of the said libel upon the ground that as a matter of law the facts alleged show at most that the libellant boarded the SS "Frank G. Drum" under a commission to board given by law and there are no facts alleged showing a breach of any duty which may have been owed by this respondent to the libellant under said circumstances.

III.

Excepts to the lack of distinctness in the allegations of the Fifth Article in that it is impossible for the respondent to ascertain from said allegations whether John One was a licensed officer of the SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum."

IV.

Excepts to the allegations of the Sixth Article upon the ground that they lack distinctness with reference to John Five in that it is impossible to ascertain therefrom whether John Five was a licensed officer of the said SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum"; and also upon the ground that it cannot be

ascertained from said allegations how John Five could be the agent, servant and/or employee of all of his co-respondents, said libel also alleging in the Fifth Article that the respondent John One was the agent, servant and/or employee of his co-respondents, including John Five, referred to in the Sixth Article.

V.

Excepts to the allegations of the Fifth, Sixth and Seventh Articles upon the ground that they lack distinctness in that in the Fifth Article John One is alleged to be the agent, servant and/or employee of his co-respondents; and in the Sixth Article John Five is alleged to be the servant, agent and/or employee of his co-respondents; and in the Seventh Article John Six is alleged to be the agent, servant and/or employee of his co-respondents; and it cannot be ascertained from the said pleading how each one of these respondents sued by fictitious names, to wit, John One, John Five and John Six could, at one and the same time, be the employees of each other and the servants and employees of each other.

VI.

Excepts to the Seventh Article in that the allegations lack distinctness with reference to the respondent John Six and it cannot be ascertained therefrom whether John Six was a licensed officer of the SS "Frank G. Drum" or a member of the crew of the SS "Frank G. Drum."

VII.

Excepts to the allegations of the Tenth Article upon the ground that they lack distinctness with reference to the libellant's alleged duties in that it cannot be ascertained what is meant by the allegation that the libellant's duties "were to check upon guards on duty and make further

checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete check-ups on the docks and ships at said Bethlehem Steel Corporation, a corporation; there being no allegation in the libel that any guards were on duty aboard said vessel.

VIII.

Excepts to the relevancy and competency of the allegation in the Eleventh Article that the libellant entered said ship "for the purpose of, among other things, inspecting said ship for the benefit of the respondents herein," in that said allegation is a conclusion.

IX.

Excepts to the relevancy and competency of the allegation in the Twelfth Article that the respondents "knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained . . . the repair docks where said boat was docked," for the reason that there is no allegation of any fact showing a proximate causal connection between any act or omission with reference to the repair docks and any injury sustained by the libellant.

X.

Excepts to the relevancy and competency of the allegation in the Twelfth Article "that the accident herein complained of was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondents," upon the ground that said allegation is a conclusion.

XI.

Excepts to the language in the Twelfth Article “among other particulars” with reference to alleged fault, upon the ground that said language is not sufficient to charge any specific negligent act on the part of the respondent and general Admiralty Rule 22 requires the libellant to propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit.

XII.

Excepts to the relevancy and competency of the recital in subdivision (f) of the Twelfth Article—“all of which constituted a trap for people on said ship at or near said hatch,” in that said recital is a conclusion.

XIII.

Excepts to the last allegation in the Twelfth Article, to wit, “There is negligence in other respects as will be shown upon the trial,” upon the ground that said allegation lacks sufficiency and distinctness.

Wherefore, respondent prays that its exceptions be sustained and that if the libel is not amended within such time as this Court shall allow, if at all, said libel may be dismissed.

LASHER B. GALLAGHER,

Proctor for Respondent Tide Water
Associated Oil Company, a corporation.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF EXCEPTIONS TO LIBEL.

I.

Libellant, as a matter of law, is not an invitee.

Title 14 U.S.C.A., Sec. 45, provides that "commissioned, warrant and petty officers of the Coast Guard are empowered to make inquiries, examinations, inspections, searches, seizures and arrests upon the navigable waters of the United States for the prevention, detection and suppression of violation of laws of the United States. For such purpose, such officers are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance"

The libel alleges that the SS "Frank G. Drum" was on navigable waters of the United States; that the libellant on the 6th day of August, 1944, was in charge of a detail of guards; that he boarded said vessel in his official capacity and in line with his duties. Under such circumstances it cannot be logically contended that the libellant was an invitee. The respondent had no possible right to refuse to permit the libellant to board the vessel. If it had refused to permit him to board the vessel he was authorized to use all necessary force to compel compliance. An invitation does not exist unless the alleged invitor has lawful power to permit or refuse to permit another person to enter upon real or personal property. How can it be contended that the libellant could have used physical force to accomplish his duty as a member of the armed forces of the United States in time of war in

boarding the said vessel and at the same time say that the respondent invited him to come aboard the vessel?

The only object for which the libellant could have boarded the vessel in the course of his duty as a member of the armed forces of the United States would be to prevent, detect and suppress violations of statutes of the United States. In other words, he comes within a group of persons who are in the same category as firemen and policemen.

“It has been held that a policeman or constable entering private premises in the performance of his duty is a mere licensee to whom the owner owes no common law duty to keep the premises safe, although the owner may be liable for an injury resulting from his neglect of a statutory duty with respect to the condition of the premises.”

45 Corpus Juris, 794, sec. 199.

“A member of a public fire department who enters a building in the exercise of his duties is a mere licensee under permission to enter given by law, and the owner or occupant of the building does not owe to such person any duty to keep the premises in a safe condition.”

45 Corpus Juris, 794, sec. 200.

In the libel there is no allegation of any fact showing any neglect of any statutory duty with respect to the condition of the SS “Frank G. Drum.”

“In the majority of jurisdictions the rule is well settled that, in the absence of a statute or municipal ordinance, a member of a public fire department, who, in an emergency, enters on premises in the discharge of his duty, is a mere

licensee *under a commission to enter given by law*, to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury." (Emphasis added.)

13 A. L. R. 638.

Please see also: 141 A. L. R. 584, supplementing the annotation in 13 A. L. R. 637-638.

There is no allegation in the libel of any overt act on the part of the respondent.

Assuming, for the sole purpose of argument (in spite of the authorities hereinabove cited) that the libellant could have been an invitee of the respondent aboard said vessel, there is no allegation of any fact showing that he was invited to be in the particular part of the vessel where he sustained his injury. It is an elementary principle that a person may be an invitee in one part of premises and a trespasser or licensee in other parts. For instance, a passenger on an ocean-going liner is an invitee while using those parts of the vessel set aside for the accommodation or amusement of passengers. On the other hand, if a passenger, out of curiosity, roams around the engine room, even with the consent of the licensed officers in charge thereof, he would be a licensee. If he did the same act without the consent of the licensed officers, he would be a trespasser. Therefore, if it is legally possible for the libellant to have been an invitee of the respondent, he should allege facts showing that he was at the place of the accident as an invitee of the respondent.

The libellant fails to allege that he was using any passageway which was designed for the purpose of affording access from or to any part of the vessel.

II.

“A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner’s business thereon. Accordingly the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property is not liable for injuries to licensees due to the condition of the property, or, as it has been expressed, due to passive negligence or acts of omission. A fortiori, if licensees choose to make use of property although there is open and obvious danger thereon, the owner cannot be held liable for injury to a licensee because of such danger. It has been said, however, that the owner is under a duty not to expose a licensee to perils which could be avoided by the exercise of reasonable care. The owner has been held not liable for injuries which a mere licensee on his property has received from excavations, a trench, a ditch, a cistern, a hole in the ground, an uncovered coalhole, a

steam pit, a drain used to carry away hot water, a vat of hot water, elevators, unguarded or insufficiently guarded elevator shafts, floor openings, a hole in a bridge, an opening in the platform of a fire escape, uninsulated or insufficiently insulated electric wires, stairways, scantlings or pieces of timber on the floor of a hall of an office building, lack of light in a tenement house hallway, a pile of lumber, a heap of stones, a derrick, a moving crane, log rollways, a defective farm crossing over a railroad, a defect in the roof of a barn, a wire stretched across the outer edge of a lawn to keep off trespassers, a barbed wire fence along the boundary of the premises, the fall of a gravestone in a cemetery, a fire on the premises, an explosion of gas, the breaking of a machinery belt, or failure of a servant of the owner to use reasonable care in throwing a bale of hay from a loft.”

45 Corpus Juris, 798-802, sec. 203.

Disregarding, for the moment, the many adjectives used by the libellant in qualifying the alleged acts which resulted in his injury, it is clear that the physical cause of the injury was an open hatch in some part of the vessel. The reason, as stated by the libellant, for his fall into the open hatch was that said open hatch was not illuminated so that the libellant could see said open hatch.

The libellant alleges that the vessel was docked at the time and place, for the purpose of undergoing repairs by the respondent Bethlehem Steel Corporation (Libel, page 3, Eighth Article). He therefore had knowledge of the fact that he could not reasonably expect the vessel to be in the same condition throughout as might be the case if the same had not been withdrawn from navigation.

If, as is contended by the respondent, the libellant was at most a licensee, he must allege facts showing that the

respondent committed some overt act after the libellant boarded the vessel as such licensee and that such overt act proximately caused his injury. There was no affirmative duty on the part of the respondent to perform any act such as lighting the area around the hatch. Respondent's only duty was to refrain from committing an overt act of negligence after the libellant came aboard. A licensor is entitled, under the law, to remain passive and has no affirmative duty. There is no allegation of any fact in the libel showing that the libellant notified any responsible agent of the respondent that he intended to go to the particular part of the vessel where the open hatch would be encountered. Libellant does not even allege that any agent or employee of respondent was aboard the SS "Frank G. Drum" at the time the libellant went aboard. All he says is that John One was charged with the duty of permitting members of the Coast Guard to board the SS "Frank G Drum" for the purpose of making inspections of said ship and that John Five "was in charge of that certain ship which was then and there known and referred to as SS 'Frank G. Drum' hereinafter mentioned."

Respondent has already shown (15 U.S.C.A., Sec. 45) that there wasn't anything the respondent could have done about keeping the libellant off of the vessel. The mere fact that John Five was in charge of the vessel does not mean that John Five was on the vessel.

Although the libellant alleges that the Tide Water Associated Oil Company was the owner and operator of the SS "Frank G. Drum" at the time of the happening of the accident this is a legal impossibility. Pursuant to Executive Order No. 9054, 7 Fed. Reg. 837, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327, there

was established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration under the direction of an Administrator appointed by and responsible to the President. The Executive Order provides in part as follows:

“The Administrator shall perform the following functions and duties: a. Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.”

Title 50 U.S.C.A., App. Sec. 1295.

III.

With reference to Exceptions No. III, IV, V and VI:

The respondent contends that it is at least entitled to know the capacity in which the respondents John One, John Five and John Six were serving as agents or servants or employees. Unless the libellant is compelled to give some clue to the scope of the employment of these fictitious persons and what their duties were by alleging facts clearly showing the relationship which the libellant claims each one of these fictitious persons bore to the respondent, then it will be impossible for the respondent to prepare an answer in accordance with the requirements of general rule 26 which states that “all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel,”

The libellant has stated his contentions with reference to John One, John Five and John Six in such a confused manner as to make it impossible to determine the identity of any one of such fictitious persons. If the libellant would allege that John One was the master of the SS "Frank G. Drum" or some other officer of said vessel or a bos'n or able bodied seaman, respondent would have some information upon which to predicate an answer. The Court will take judicial notice of the fact that it is possible for the libellant to obtain exact information with reference to the name, address and capacity of each person who might have been on board the vessel at the time and place referred to in the libel. Libellant can obtain a copy of the Shipping Articles.

More confusion arises because of the allegations that John One was an agent, servant and employee of John Five and John Six; that John Five was an agent, servant and employee of John One and John Six; and that John Six was an agent, servant and employee of John One and John Five.

IV.

In the Tenth Article the libellant refers to checking upon guards on duty but he doesn't allege that there were any guards of any kind on board the SS "Frank G. Drum" at the time he boarded the vessel. If there were no guards on duty aboard said vessel then obviously the libellant would not be required to go aboard for the purpose of checking on any guards. His allegation that it was also his duty to make further checks on docks to verify the reports of the Coast Guardsmen on duty means nothing unless he alleges that some Coast Guardsman on duty on said vessel made some report which required the presence of the libellant. In the final analysis, it is quite clear from the law governing the Coast Guard (Title 14 U.S.C.A.,

Sec. 45) the only duty of the libellant would be to inspect the vessel for the purpose of finding out whether there had been any violation of any law of the United States.

V.

The allegation in the Eleventh Article that the libellant entered the ship for the purpose of inspecting said ship "for the benefit of the respondents herein" is a conclusion.

If any inspection made by the libellant was for the benefit of this excepting respondent, the facts should be alleged so that the court could draw the conclusion that the inspection was for the benefit of the respondent. If we look at the allegations in the other Articles of the libel we find that libellant claims that he was checking upon guards and verifying the reports of the Coast Guardsmen on duty. These allegations show no benefit to the respondent in the sense that the benefit was one which would create the relationship of invitor and invitee.

If a fireman comes into your house to put out a fire his entry is for the benefit of the owner of the premises and also for the benefit of the neighboring houses but it is not the kind of benefit which is referred to as one of the elements which makes up the relationship of invitor and invitee. Preventing spies and saboteurs from damaging the vessel would, of course, benefit the owner of the vessel, but the obvious purpose of the activities of the libellant was to safeguard the interests of a nation at war. As a matter of law it would be impossible for a member of the armed forces of the United States to be assigned to the duty of protecting private property for the benefit of the owner of such property. The services of the armed forces are never used for the purpose of policing private property for the benefit of the individual owner.

VI.

The allegation in the Twelfth Article with reference to the activity of the respondent in so far as the repair docks are concerned has no place in the libel for the reason that there is lack of any showing of proximate causal connection between anything done or omitted on the repair docks and the act of the libellant in falling into an open hatch.

Admiralty rules of pleading require specific allegations of negligence. The libellant is evidently proceeding on the theory that the rules of pleading adopted by the State of California are applicable in admiralty. There is no question about the fact that negligence cannot be pleaded generally in admiralty. Aside from this observation, the allegation with reference to the contention that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondents is not even a general allegation of negligence. It is an attempt to plead proximate causal connection but the rules require an allegation of fact showing a proximate causal connection between a specific negligent act and the injury. Therefore, this particular language on lines 29 to 31, page 4 of the libel, is a conclusion and therefore irrelevant and incompetent.

The language "among other particulars," line 1, page 5 of the libel, is irrelevant and incompetent for the reason that it alleges no specific act of negligence. It is also lacking in distinctness. The respondents are entitled to know before the day of trial and the introduction of evidence what the libellant claims as the basis of his suit.

The same defect exists with reference to the allegation in line 1, page 6 of the libel, that "there is negligence in other respects as will be shown upon the trial."

The only fact alleged in subdivision (f) of the Twelfth Article is that the respondents “permitted said hatch to remain open, unguarded and in a dark condition.” If an open unguarded hatch, not illuminated, is a trap, then the Court can draw that conclusion itself. The libellant cannot, by a conclusion, establish that an open unguarded and unilluminated hatch is a trap. A trap is something which is set for the purpose of injuring another. There is no allegation in the libel to the effect that the respondent opened the hatch and left it open for the purpose of causing the libellant to fall into it.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Respondent, Tide Water Associated Oil
Company, a corporation.

No. 11757

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,
Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL
COMPANY, a corporation,
Appellees.

**BRIEF OF APPELLEE BETHLEHEM STEEL
COMPANY.**

IRA S. LILLICK,
JOHN C. McHOSE,
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FILED

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PAUL T. O'BRIEN,
CLERK

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COMPANY, a corporation,
Appellees.

**BRIEF OF APPELLEE BETHLEHEM STEEL
COMPANY.**

Introductory Statement.

This appeal seeks reversal of a negligence judgment based on decisions of fact. Only elemental principles of law are involved.

Appellee Richardson, Coast Guard seaman first class, brought suit in admiralty jointly against appellant Tide Water Associated Oil Company, owner of the tanker FRANK G. DRUM (to whom we will refer as "Associated"), and appellee Bethlehem Steel Company (to whom we will refer as "Bethlehem"). Richardson sought recovery for injuries sustained when he fell into the port bunker hatch while attempting to cross the deck of Associated's tank vessel, FRANK G. DRUM, at night, while the vessel was docked in the Los Angeles Harbor repair yard of Bethlehem, undergoing repairs.

The trial court, who saw and heard *all* the witnesses, held that the officers and crew of the FRANK G. DRUM were negligent in failing to guard the bunker hatch, light it after dark, or give warning to Richardson that it was open.

At the trial, as in this appeal, Associated sought to throw blame for the accident on Bethlehem. The trial court decided that negligence by Bethlehem was not proved, but held further, that even if it was conceded that Bethlehem was negligent in failing to put guard ropes around the bunker hatch at 3:30 p. m. on Saturday afternoon, August 5, 1944, when Bethlehem workmen ceased work for the weekend and left the ship, this was not the proximate or primary cause of the accident, which did not happen until after 9 p. m. the following night, Sunday, August 6th.

During the intervening thirty hours the officers in charge of the ship knew the bunker hatch was open and could have roped it off. Instead, they acquiesced that this condition continue. They also had ample opportunity to provide a light at night. The trial court held that the proximate cause of the accident was failure by Associated's employees, the ship's officers and crew, to take any of these precautions.

It is elemental, and requires no citation of authority to this court, that findings and conclusions of the District Court, based upon testimony in open court, are entitled to great weight and will not be disturbed unless they are clearly against the weight of the evidence.

Summary of Argument.

It is difficult to determine from the opening brief what points of alleged error appellant actually seeks to rely upon insofar as Bethlehem is concerned. As we finally boil it down, appellant attempts to present two points as respects the trial court's judgment dismissing the libel against Bethlehem.

The first basis of argument is that the repair contract was a contract of bailment and Bethlehem therefore became responsible to Richardson for his injury because Bethlehem was bailee and in charge and control of the FRANK G. DRUM at the time of the accident.

The second basis of argument is that negligence of Bethlehem, rather than negligence of Associated, caused the injury to Richardson.

These two points we will discuss in this reply brief. The remainder of the opening brief argument applies only to appellee Richardson, to whom we leave reply.

ARGUMENT.

A. Misstatements in Appellant's Brief.

Before discussing the two points stated above, we point out several statements made in appellant's brief which are not supported by the record and are representative of the false premises on which this appeal is based.

1. Statements are made at pages 3, 21, 29, 31 and 52 that the FRANK G. DRUM had been "delivered" to and was in Bethlehem's "custody" and "control" as "bailee." The trial court found that Associated was the owner and in charge and control of the tanker which was undergoing repairs pursuant to a contract which was *not* a contract of bailment. Officers and members of the crew of the FRANK G. DRUM were on board and in charge and control of the vessel while repair work was being done [Apostles 78, 79, 85].

The following evidence thoroughly supports these findings:

Exhibit D: Repair contract between Associated and Bethlehem;

Harrington [Apostles 327-361];

Schleef [Apostles 416-451];

Humble [Apostles 451-461];

Frederick [Apostles 465-478];

Bengston [Apostles 478-499].

A finding that Bethlehem was "bailee" would have been erroneous.

2. Statement is made at pages 4 and 34 that the vessel had no portable lighting equipment which could have been used. The trial court found that lighting the portion of

the ship where the port bunker hatch was located was within the control and duty of Associated [Apostles 86]. To anyone familiar with ships of the size of the FRANK G. DRUM, the statement that such a vessel "had no portable electric light equipment which could have been used to illuminate the surface of the main deck" is ridiculous. The record quite clearly establishes that such equipment was available on board.

Courtiour [Apostles 392, 407, 415];

Schleef [Apostles 421-423, 448];

Humble [Apostles 456, 458, 459].

Third Officer Humble also testified that the security officer in charge turned on the lights at night [Apostles 458-459].

3. Statement is made at pages 9, 24 and 52 that a contract with the United States had been made by Bethlehem, terms of which affected the status of the FRANK G. DRUM at the time of the accident. A copy of a supposed contract is set forth in Appendix F, pages 13-17. Appellant even goes so far as to state at page 52 that Bethlehem "concealed" such a contract from the trial court. This court, of course, cannot here consider an alleged contract which is not a part of the record.

Contrary to the statement made, *we* actually questioned Bethlehem's witness Harrington to bring out that work *was* being done for the United States' account at the time the vessel was being repaired for Associated [Apostles 330]. Harrington testified that the ship came into the yard on application of the Marine Superintendent of Associated, Oscar Lundin. Certain other repairs which the War Shipping Administration took advantage of the opportunity to have done, were arranged later.

The first suggestion that a repair contract between Bethlehem and the United States should have been introduced in evidence at the trial of this case, is in appellant's opening brief. We did not offer this contract because, in our opinion, it was not material and would certainly have been inadmissible if objected to. The only contract involved as between the parties to this litigation was the contract between Bethlehem and Associated, which was introduced as Exhibit "D." The work in the port bunker tank was Associated's work, with which the United States had nothing to do [Apostles 331].

If appellant considered that the contract under which Bethlehem did some other work for the United States was material, such contract should have been requested or questions asked about it on cross-examination of Harrington. No request was made and no questions were asked. It is improper, and outside the issues before this court, to now attempt to bring such a subject into this appeal.

4. Statements made at pages 19-21 are apparently intended to convey the impression that the War Shipping Administration, rather than Associated, was in control of the FRANK G. DRUM. Testimony and the admission of appellant [Apostles 127, 133, 470, 480, 483] proved the vessel was owned by Associated and under time charter to the War Shipping Administration. The officers and crew were provided and employed by Associated. The *control* of the vessel remained at all times with Associated. The trial court so held [Apostles 78, 80] and the record thoroughly supports the findings.

5. Statements made at pages 21, 23, 26 and 28 also suggest that the crew was under control of the War Shipping Administration. Testimony of the ship's own witnesses disproves this. They were employed by Associated

and doing Associated's work while the ship was in the yard.

Scheef [Apostles 443-444];

Frederick [Apostles 469-470].

Captain Bengston confirmed that he was in charge of the ship when it came into the yard [Apostles 479] and that guards, including a "roving guard," were employed by Associated as required by the regulations [Apostles 493-497].

B. The Repair Contract Was Not a Contract of Bailment.

Associated recognizes this appeal must fail unless this court believes, contrary to the trial court, that the FRANK G. DRUM was delivered to Bethlehem as "bailee" for the repairs.

The repairs were arranged by oral discussions with Associated's Marine Superintendent [Apostles 327]. Written confirmation was by specifications and letters, in evidence as Exhibit "D." They do not provide that Bethlehem assumes charge or control of the vessel. Bethlehem offered testimony at the trial to show a long established custom and policy at Los Angeles Harbor, that Bethlehem, as well as other ship repair yards, will *not* take possession or control of ships during repairs [Apostles 333, 346]. The trial court rejected this offer and the evidence did not go in as offered. But there was ample admitted evidence to support the court's finding that Bethlehem did not become a "bailee."

Associated offered nothing other than statements in argument to prove that Bethlehem did become a "bailee."

Associated employed officers and crew on salary, who were on board and in charge of the tanker at all times. At the time Bethlehem was doing repair work called for by specifications, these men did other repair work such as overhauling and reconditioning life boats, and painting. Captain Bengston and Chief Officer Frederick worked every day. Guards required by regulations to be furnished by the master, vessel owner, or agent, were on the job.

Richardson expected to contact the ship's senior deck officer on watch while on board making his inspection. He looked to the ship, not Bethlehem.

No representative or employee of Bethlehem was even on board the ship at the time of the accident.

C. Negligence of Bethlehem Was Not the Cause of the Accident.

Bethlehem owed no duty of care to Richardson. Only the owner or person in control of a vessel owes a duty of care to a licensee or invitee who comes on board.

If Bethlehem *was* negligent as respects a duty of care owed *Associated*, and such negligence caused an injury for which Associated was legally responsible to Richardson, Associated could, at most, look to Bethlehem for indemnity, or in admiralty, recovery over.

However, if Bethlehem was negligent in failing to do something its contract with Associated required it to do, such negligence would not make Bethlehem liable unless it was the *proximate and primary cause* of the injury resulting.

In order to hold Bethlehem liable the trial court would have had to find, first, that Bethlehem was negligent in connection with the work it had contracted to do on the

tanker; and second, that such negligence was the proximate and not a secondary cause of Richardson's injury.

The evidence fails to prove these points. Bethlehem did not take over or assume control of the ship or the port bunker hatch. No specific duties as to any part of the hatch were ever assumed by Bethlehem. The hatch was used only as an entrance to the port bunker tank. Bethlehem did not assume charge or control over it any more than over any other door or passageway on board the ship used by Bethlehem workmen.

The evidence did not prove *who* opened the hatch wide or *who* removed the rope. Even if it be conceded that Bethlehem should have put a rope around the open hatch on Saturday and did not do so, the ship's officers who saw the hatch was open and knew the rope was not in place, did nothing about it, and acquiesced in the condition for some thirty hours after Bethlehem workmen left the ship before the accident occurred Sunday night.

The cause of the accident was failure to light the bunker hatch after dark. What parts of the ship were to be lighted was entirely up to Associated. Third Officer Humble testified [Apostles 458] that it was the duty of the security officer on watch to turn on the lights wanted on the ship. He also said it was customary to put cargo lights on [Apostles 455].

In order to hold Associated liable the court had to find, and did find, that Richardson went aboard the tanker as an invitee; that the port bunker hatch was left open *and unlighted* at night; that this created a dangerous condition which was the cause of Richardson's injury, and that Associated was the owner and in control of the vessel at the time.

Associated argues that Bethlehem was negligent because its men did not rope off the hatch when work was stopped for the weekend. It was not Bethlehem's custom to rope off hatches with coamings adjacent to bulkheads. The trial court decided that if it agreed that this was negligence, it still was not the proximate, but only a remote or secondary cause of the accident, two nights later. The ship knew this condition existed. Chief Officer Frederick, who followed the Bethlehem workmen off the ship, so testified [Apostles 468, 469, 474]. Nothing was done about it. The ship acquiesced that the condition continue.

The open hatch was not dangerous in the day time. Anyone could see it. When it became dark the ship's officers evidently did not think it necessary to put up a light. This was the *real and proximate* cause of the accident.

D. Authorities Cited by Appellant.

No actual error in law is urged and only two cases are cited on the points being discussed in this reply brief.

In *Long v. Silver Line*, 41 F. (2d) 367, 48 F. (2d) 15, the basis of the lower court's decision as stated in the last paragraph of the opinion, was that the proximate cause of the accident was failure to supply adequate lighting. The obligation to furnish lights under the circumstances in that case was on the repair yard. Repair yard employees were actually working at the place at the time of the accident. The injured man was a repair yard employee. (He undoubtedly brought suit solely against the

ship, because the Longshoremen's and Harbor Workers' Compensation Act would prevent suit against his employer.) The court held the ship was not responsible, and that the only fault was in failure to supply light in the 'tween deck, which was at that time entirely under the control of the repair yard. The yard was providing the lights used and its men were actually at work on board the ship when the accident occurred.

In the present case the cause of the accident was again failure to supply light. Here, however, the ship was in control at the time it became necessary to turn on the light. The failure to provide light was, therefore, the failure of the ship. Bethlehem did not even have any employees on board that day.

In *Crane Elevator Co. v. Lippert*, 63 Fed. 943 (1894), the boy employed by Western Union was injured by falling over a pile of construction material negligently left by the elevator company, which was doing work in a corridor in the building occupied by Western Union. Here also, the suit was only against the elevator company and not against the owner of the building. The court pointed out (page 946) that the obstructions were placed in the hall under a grant of authority from the owner of the building and the elevator company's duties and responsibilities were co-extensive with those of the owner. Since the suit was against the elevator company alone, the court found this concern negligent and liable to the injured boy.

Conclusion.

The decision by the trial court was carefully reached, after a four-day trial in which all the witnesses personally testified and were seen by the court. The court then attended on board the FRANK G. DRUM to see just what the actual conditions were. The case was argued and thoroughly briefed.

The decision was essentially one of fact as to simple negligence, and only elementary questions of law were involved.

The findings are amply supported by the evidence.

The decision should be affirmed as respects appellee Bethlehem.

Dated Los Angeles, March 25, 1948.

IRA S. LILLICK,

JOHN C. McHose,

LILLICK, GEARY & McHose,

Proctors for Appellee, Bethlehem Steel Company.

No. 11757.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,
Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL
COMPANY, a corporation,
Appellees.

BRIEF OF APPELLEE, DAVID LAWTON
RICHARDSON.

GAINES HON,

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315 West Ninth Street, Los Angeles 15,

Proctors for Appellee, David Lawton Richardson.

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COMPANY, a corporation,
Appellees.

**BRIEF OF APPELLEE, DAVID LAWTON
RICHARDSON.**

Introductory Statement.

The Appellee, David Lawton Richardson, was seriously injured while making a general routine inspection on the tanker, S. S. Frank G. Drum, which at the time of the accident was owned and operated by Appellant, Tide Water Associated Oil Company, a corporation. Said tanker was docked for general annual repairs and inspection at the shipyards of the Appellee, Bethlehem Steel Company, a corporation, which was located in the Los Angeles-Long Beach Naval Defensive Sea Area. Said area was governed by the rules set forth in Appellee's Exhibit 6 and such other rules as might be promulgated by the Captain of the Port.

At the time of the accident, Richardson was a member of the United States Coast Guard. He had received

orders from his commanding officer, to go aboard all vessels in Bethlehem Steel Shipyards and make a general routine inspection. The inspection included, among other things, looking for fire extinguishers, hoses, and taking a report from the mate at some time while Appellee Richardson was on the ship.

Prior to entering the gate at the Bethlehem Steel Company premises, Appellee Richardson showed his I.D. (identification) card to the guard on duty, signed the log and entered through said gate. He then went directly to the gangway of the said S. S. Frank G. Drum. There was a guard at the foot of the gangway, in a little house close by, who waved him aboard the said tanker. This gangway guard was an employee of Appellant Tide Water.

There was a portable electric light at the gangway, which was illuminated and was fastened to the side of the ship at the top of the gangplank. After boarding the ship Appellee Richardson looked in his immediate vicinity at the head of the gangway to see if anyone was on deck and, failing to see anyone, walked into the starboard passageway. He proceeded aft along the passageway to make a general inspection. The opening from the passageway onto the open deck amidship on both the starboard and port sides were covered by means of canvas flaps. The entire passageway was lighted but said lights did not reflect onto the deck of the ship. The deck was unlighted.

When Richardson reached the port side of the passageway he pushed back the canvas flap, stepped over the coaming of the port passageway with his left foot, turning to the right as he did so. Thereafter he brought his right foot over the coaming of the port passageway and when he attempted to set his right foot down to the right of the

port passageway, and immediately to the right of his left foot, it was over an open, unlighted and unguarded port bunker hatch and as a result Richardson was immediately precipitated to the bottom of the said port bunker tank, a distance of approximately 36 feet, receiving serious and permanent injuries. The accident happened between 9:00 and 9:30 o'clock P. M. Sunday night.

The said port bunker hatch opening was approximately 4 feet by 6 feet in size, and was approximately 36 feet in depth. This open and unguarded and unlighted hatch was immediately to the right of the port passageway. At the time Richardson fell into the said bunker hatch it was completely open and the steel hatch cover was raised and leaning back flush against the bulkhead. Said bunker hatch at the time of the accident was wholly unguarded and unlighted and was without any warning signs whatsoever.

The Chief Mate in charge of said tanker at the time of the accident was Adrian Rolland Frederick, who was an employee of Appellant, Tide Water, and who had knowledge that men, such as Richardson, who made inspections for the United States Coast Guard, would inspect the Frank G. Drum at different intervals. He testified as follows [Ap. pp. 475 and 476]:

“Q. By Mr. Hon: Mr. Frederick, you knew, sir, as chief mate, that members of the United States Coast Guard would at different intervals inspect that ship, didn't you, sir? A. Yes; I did.

Q. And you knew that they would inspect it night time as well as day time, didn't you? A. I did.

Q. You knew that, in inspecting that ship, they were likely to go over any portion of the ship, isn't that right? A. I never followed them around. I

don't know where they went. I will tell you I knew they came aboard and they had a paper for me to sign and I signed the paper and I answered their questions specifically, and signed the paper as the chief officer of the ship.

Q. If you were not in sight, they would look for you until they found you? A. Yes, sir."

Chief Mate Frederick also had personal knowledge that the port bunker hatch was being left open, unguarded and unlighted every night when the Bethlehem shipyard crew left work. He testified under questioning by Appellant's own counsel as follows [Ap. pp. 467 and 468]:

"Q. By Mr. Gallagher: Mr. Frederick, did you have any personal knowledge, until after this accident happened, that the shipyard crew was leaving that port bunker hatch open every night when they left the job? A. I certainly did.

Q. When did you find it out? A. I saw it every morning when I came to work. The hatch was wide open.

Q. Was it ever roped off? A. No, sir. It was just as they left it in the afternoon.

Q. Was it ever lighted? A. No, sir. Just a second. One or two nights they did leave their working light on down in the bottom of that tank."

The accident happened between 9:00 and 9:30 o'clock on a Sunday evening. Chief Mate Frederick testified he knew that the lid to the bunker hatch was left open and the port bunker tank opening unguarded when the ship's crew quit work at 3:30 o'clock Saturday afternoon. Appellee directs the Court's attention to the fact that work was not again resumed until the following Monday morn-

ing, which was the day following the accident. Chief Mate Frederick testified as follows [Ap. p. 469]:

“The Court: Did you see the shipyard crew leave after their day’s work, the next morning at 3:00 o’clock? A. I did, sir.

The Court: When was the last time they left the work? A. At 3:30 Saturday afternoon.

The Court: And what was the condition of that opening at that time? Was the lid down or was it open or roped off or what? A. It was secured to the bulkhead, the forward bulkhead, of the fire room.

Mr. Hon: Does that mean it was open?

Mr. McHose: Yes; I take it—

The Court: It was open? A. It was wide open.

The Court: It was flush against the bulkhead?
A. Flush against the bulkhead; yes, sir.

The Court: Was it roped off in any way when they left the work? A. No, sir; it wasn’t.”

Answer of Appellee Richardson to Appellant’s Specification of Assignments of Errors.

Appellee Richardson will confine his answers to specification of assignments of errors numbers 1 and 2. In as much as specification of assignments of errors numbers 3, 4 and 5 deal directly with the liability to Appellee Richardson as between Appellee Bethlehem Steel Company, a corporation, and Appellant Tide Water Associated Oil Company, a corporation, this Appellee Richardson is willing to submit these points to the Court on the record as it now stands without comment.

Apparently specification of assignment of error number 6 requires no argument since none was advanced in support of same by Appellant and appears to be nothing

more than a general statement on the part of Appellant. Appellee Richardson is willing to stand on the Findings of Fact and Conclusions of Law as signed by the Trial Court.

Answer to Specification of Assignments of Errors Numbers 1 and 2.

Specification of assignments of errors numbers 1 and 2 are so closely related that they can best be answered together.

Appellee Richardson contends that the answer to both of these specifications of assignments of error are fully covered in the "ANSWER OF LIBELLANT TO EXCEPTIONS TO LIBEL IN PERSONAM OF RESPONDENTS TIDE WATER ASSOCIATED OIL COMPANY, A CORPORATION, AND BETHLEHEM STEEL COMPANY, A CORPORATION," which is set forth in full on pages 29 to 36, inclusive, Volume I, Apostles on Appeal, a copy of which is set forth in Appendix A.

Libellant's answer to respondents' exceptions were filed by Appellee in answer to Appellant's Exceptions to Libel, which contained the same arguments now advanced by counsel for Appellant on Appeal, which exceptions were heard before the Hon. Charles C. Cavanah and overruled in their entirety. We contend that the "ANSWER OF LIBELLANT TO EXCEPTIONS TO LIBEL IN PERSONAM OF RESPONDENTS TIDE WATER ASSOCIATED OIL COMPANY, A CORPORATION," as set forth in Appendix A, correctly states the law and fully answers Appellant's specification of assignments of error number 1 and 2, and no useful purpose would be served in attempting to further elaborate on the subject at this place.

We might add that the rule as to invitees and licensees is quite clearly set forth in 38 Am. Jur. 784 at paragraph 123 which is quoted at length in Appendix A. The cases there referred to show unequivocally that Appellee Richardson falls in the class of an invitee and shows that there is no merit to the contention of Appellant that Richardson was anything other than an invitee.

In this connection, however, we feel that it would be well, in answer to Appellant's contention to add the following: The testimony shows that the tanker was docked within the Los Angeles-Long Beach Naval Defense Area at the time of the accident. Further, that the tanker was subject to the rules and regulations, which had been promulgated as a wartime defensive measure of security, as well as for the benefit of owners and operators of ships and tankers. Ships and tankers coming into this naval defensive area were subject to such rules as might be promulgated by the Captain of the Port and such rules as contained in Appellee's Exhibit 6.

Appellant well knew that when they brought their ship into this naval defensive area for repairs that it was to be inspected by the United States Coast Guard and subject to the rules and regulations, as contained in Appellee's Exhibit 6, and such rules and regulations which were, or might be, promulgated by the Captain of the Port. In fact, the Chief Mate Frederick, an employee of Appellant, Tidewater, testified that he knew that a member of the United States Coast Guard would inspect the ship at different intervals and at said times take a report from him. [Ap. p. 475.]

Appellant has attempted to make an analogy between Appellee Richardson and a fireman or a policeman. It can be readily seen that no such analogy can exist in this case,

particularly for the following reasons, Firemen and policemen have generally been held not to be invitees for the reason that they come on in moments of emergency and unforeseen circumstances and their presence cannot be presumed to be anticipated by the owner of the premises. The distinction has been explained on the basis that firemen and policemen are likely to enter at unforeseeable times and places, and the possessor cannot be expected to have his premises constantly in readiness for them. However, in the case at bar, we have the testimony of members of Appellant's own crew, who were on duty at the time that the accident occurred, wherein said members specifically state that they knew that members of the United States Coast Guard would and did at different intervals make an inspection of the ship. [Ap. pp. 475 and 476.]

In answer to Appellant's statement that Appellee Richardson, was as a matter of law not an invitee because of the provisions of Title 14, U. S. C. A., Section 45, your Appellee, Richardson, has been unable to find anything in said paragraph which provides that a seaman first class making an inspection of the type Richardson was making is not an invitee as a matter of law. Counsel for Appellant well knows that said statute is one of inclusion and not exclusion. Further Richardson was acting upon orders of his commanding officer, Lieutenant Gregory, a commissioned officer, included under the section above referred to.

In answer to Appellant's contention that Appellee Richardson was aboard the vessel by authority of the United States Coast Guard and that, therefore Appellant had no authority to exclude him from the vessel, it must be borne in mind that Appellant voluntarily took its ship to this

defensive naval area and submitted itself to the rules and regulations of the United States Coast Guard, which in itself was consent and invitation. In this respect, the cases referred to in Appendix A of this brief, dealing with grain inspectors and custom inspectors, are strictly analogous to the cases at bar and we contend these cases should be controlling in the case at bar. Appellant well knows that he cannot successfully contend that said inspections, as made by the Coast Guard, and the inspection being made by the Appellee at the time the accident occurred, were not for the benefit of Appellant. Clearly the general inspection, which consisted among other things, of inspecting fire extinguishers and also of determining if there was any sabotage [See testimony of Admiral Higbee, pp. 260 to 295, incl.] were for the benefit of Appellant Tide Water. If any damage occurred on said ship, arising from sabotage or lack of sufficient fire extinguishers, Appellant would suffer thereby.

Appellant has attempted to set forth at great length that at the time of the accident said tanker was docked for the specific purpose of undergoing repairs ordered by the War Shipping Administration.

William A. Harrington, employee of Bethlehem Steel Corporation, testified that the repairs in the port bunker tank were for the account of and contracted for by Appellant Tide Water and were paid for by Appellant Tide Water and were for the benefit of Appellant Tide Water and that although certain work was being done at the request of the War Shipping Administration not any of the work ordered to be done by the War Shipping Administration had anything to do with the work being done in the port bunker tank, which had been ordered by Appellant Tide Water. [Ap. pp. 326-362.]

Insofar as the cases cited by Appellant are concerned, it is apparent, upon the reading thereof, that the same do not have any bearing on the issues involved in this appeal and are clearly not in point. Appellee submits that any further discussion, concerning the same, is unwarranted.

Appellant refers to the fact that Richardson had been receiving a pension of \$41.00 per month from the United States Government. The Court's attention is called to the fact that the Trial Court had this evidence before it at the time of making its decision and all issues with respect to the effect of such a pension, if any, were doubtlessly considered by the Trial Court in arriving at its award.

In answer to Appellant's contention that Appellee was guilty of contributory negligence, Appellee Richardson contends that the evidence in this respect speaks for itself; there was an open, unguarded, unlighted hatch of the approximate dimensions of 4 feet by 6 feet—and approximately 36 feet deep; that Appellant by its own testimony admitted that it knew that this dangerous condition existed at the very time of the accident and further knew that the ship would be inspected by a member of the United States Coast Guard; that a member of the Coast Guard would likely go over the entire ship in making such inspection. Richardson's actions were those of any normal person; to-wit, he stepped one foot over the coaming leading from the passageway to the unlighted deck and intended to turn right and in bringing the right foot over the coaming of the passageway propelled his right foot to the right within the normal range of a step and was immediately precipitated a distance of 36 feet to the bottom of this open, unguarded, unlighted hatch.

The Court, in order to determine the conditions for itself inspected the place of the accident and personally went

aboard the S. S. Frank G. Drum and *inspected* the hatch in question and the surrounding circumstances and after making such an inspection rightfully held that Richardson was not guilty of contributory negligence. In this respect we call the Court's attention to page 112 of O'Brien's Manual of Federal Appellate Procedure, Third Edition, which states as follows:

"Conclusions to be drawn from the evidence in an admiralty case are primarily for the trial judge, where the trial judge saw the witnesses, heard their testimony, and had an opportunity of passing upon their credibility and accuracy, the Appellate Court will not interfere with his findings of fact and conclusions of law, unless the record discloses some plain error of fact, or unless there is a *misapplication of some rule of law.*"

Lortie v. American Hawaiian S. S. Co. (C. C. A. 9), 78 F. (2d) 819;

The Corapeake (C. C. A. 4), 55 F. (2d) 228.

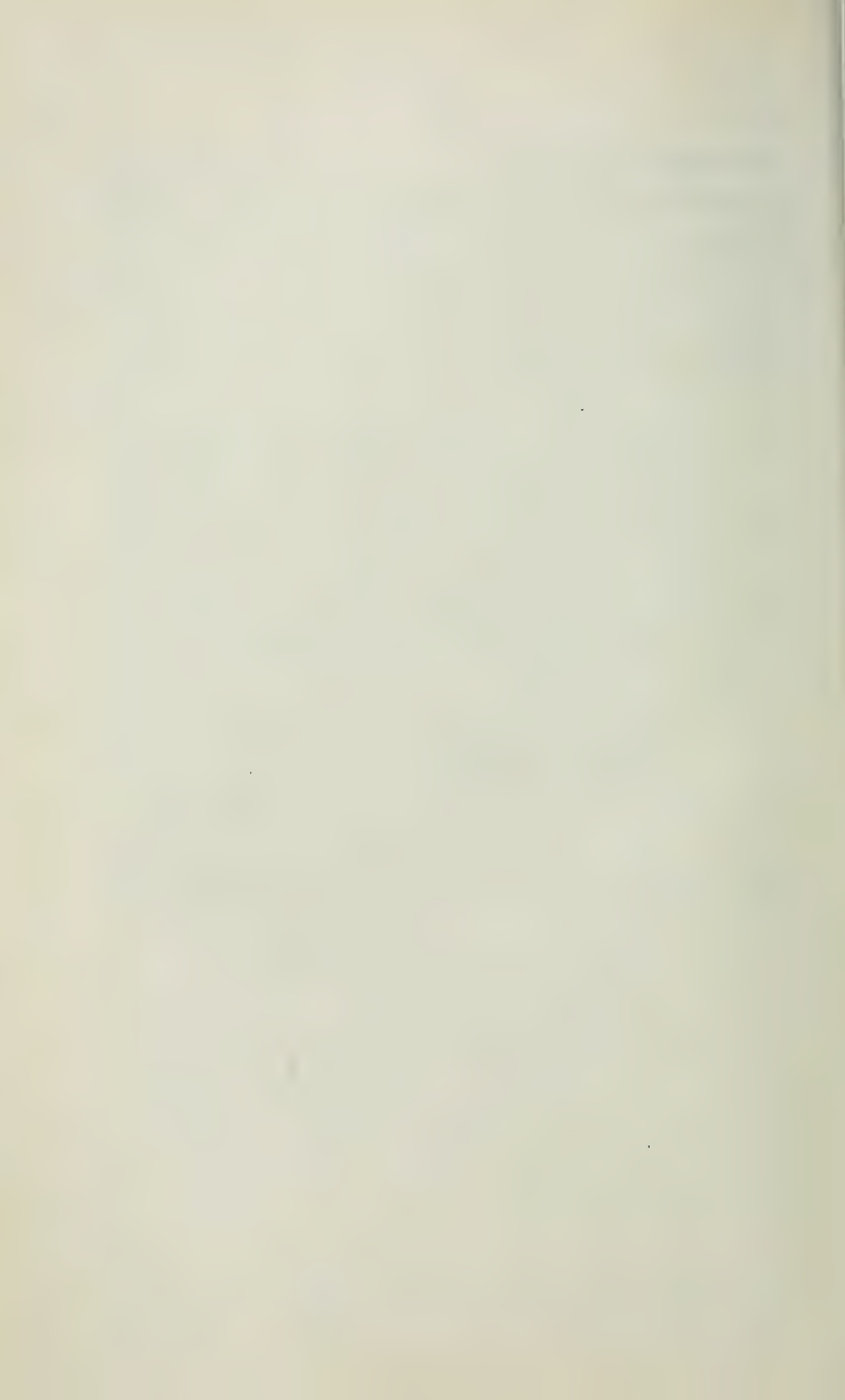
In conclusion, Appellee Richardson contends that the Judgment should be affirmed in favor of this Appellee.

Respectfully submitted,

GAINES HON,

IRVING FEINTECH,

Attorneys for Appellee.



APPENDIX A.

[Title of District Court and Cause]

ANSWER OF LIBELLANT TO EXCEPTIONS TO
LIBEL IN PERSONAM OF RESPONDENTS.
TIDE WATER ASSOCIATED OIL COMPANY,
A CORPORATION, AND BETHLEHEM STEEL
CORPORATION, A CORPORATION

I.

Insofar as Respondents' argument concerning fictitious defendants is concerned, Libellant feels that they are sufficiently described in the Libel and sufficiency identified and submits that point for the consideration of the Court without further argument.

II.

Insofar as the allegations of negligence are concerned, the Court's attention is respectfully called to pages 4, 5, and 6 of the Libel, and particularly to page 5 where seven specific acts of negligence are set forth in detail. In this respect Libellant desires to call the Court's attention to the case of Jolivel vs. City of Seattle, D. C. Wash. 1915, 226 F. 963 which holds that a Libel alleging with reasonable certainty the essential facts showing a legal duty, a default therein, and a resultant injury of which it is the proximate cause is sufficient. [28]

In fact the cases have gone so far as to hold that there is no rigid rule which prevents Libellant alleging one fault recovering on proof of a different fault. Libellant may rely upon improper speed in fog shown by defendant's evidence, although he alleged only improper steering. The Cambridge, D. C. Mass. 1871, Fed. case No. 2334. Complaint was made of the fact that Libellant in his Libel

stated "There is negligence in other respects as will be shown upon the trial." The Court is well aware of the rule that a Libellant may amend to conform to proof and this allegation was placed in the Libel to preserve his rights in the event it became necessary to amend the Libel at the time of trial to conform to proof.

Libellant contends that the Respondents have been specifically and fully informed of the acts of negligence and that the Libel is sufficient in this respect.

III.

Apparently the main basis of the exceptions of both Respondents is the contention that Libellant was a licensee and not an invitee. In support of their contention in this respect, they quoted at length from Corpus Juris and cite ~~the said~~ cases involving policemen and firemen who had responded to an emergency call and accordingly were held to be mere licensees. Such is not the situation in the case at bar. In fact some jurisdictions have held that firemen are invitees. In this respect the Court's attention is called to 38 Am. Jur. page 785, paragraph 125 which states in part as follows:

"According to some authority, an owner of property is under obligation to make his premises reasonably safe for a fireman coming thereon in the discharge of his duty, and can be held liable for an injury sustained by a fireman as a result of some defect in the premises which could have been remedied in the exercise of reasonable [29] care . . ." Meiers v. Fred Koch Brewery, 229 NY 10, 127 NE 491, 13 ALR 633.

Other jurisdictions hold that policemen and firemen coming on premises in line of their duties as such act in

an emergency and therefore are mere licensees and not invitees. The question of whether one acted in an emergency or not seems to be the distinguishing factor where they hold policemen and firemen are licensees.

The rule seems to be set forth quite clearly in 38 Am. Jur. page 784 at paragraph 123:

“Sec. 123. Public Officers—The decisions appear to be somewhat indefinite with respect to the status of public officers who enter upon premises in the discharge of duties imposed upon them by law. Some cases seem to warrant the statement that they are to be deemed, so far as the liability of the owner or occupant for negligence is concerned, not trespassers or licensees, but persons rightfully on the property. On the other hand, it has been asserted that at common law the occupier of premises is not under a duty of active diligence to protect from harm a person who enters on the premises under a license given by the law. It seems probable that no very general principle can be formulated, the cases being governed largely by their facts and surroundings. A distinction suggests itself, however, between officers who go upon property in the regular course of the business conducted thereon, whose presence may be deemed to be contemplated and known to the owner or occupant, and those public officers who enter not under any prearranged scheme, but as the result of extraordinary and unforeseen circumstances. Officials [30] of the former class may be deemed to come on the premises by invitation, whereas those of the latter description properly may be considered no more than licensees. At any rate, officers performing prescribed and regular duties which require them to visit premises at regular intervals, such as engineers and in-

spectors, have been held to enjoy the status of persons entering by invitation.” . . .

In this respect the Court’s attention is called to Article Tenth, page 4 of the Libel, and particularly the last portion thereof, and also Article Twelfth, page 5, paragraph (g) thereof.

There are numerous cases involving this very point in California. The case of *Wilson vs. Union Iron Works*, 167 Cal. 539 was a case where a United States Inspector of Customs on the morning of the accident had a duty to board the steamer “Mongolia” at Pier 44 and stay on board the ship until it reached defendant’s drydock. When the gangplank was made fast it was his further duty to go down first and allow no one to precede him so that other custom officers who were waiting for his arrival at the foot of the plank could go aboard the ship and immediately search the passengers for dutiable articles before anyone left the ship. While descending the plank it broke due to a defect. Under this set of facts the defendant claimed that plaintiff was merely a licensee at most and owed him only that duty which was owing to a licensee.

The Court held “Under these circumstances it is clear that the defendant owed to all persons lawfully and properly on board such vessel on arrival at the dock and there wishing to leave it, the duty of providing a safe and sound gangplank for their use.”

.

“It was, at all events, bound to exercise reasonable and ordinary care for the safe carriage of those whom it had reason [31] to expect would avail themselves of that means of leaving the vessel.”

“The plaintiff stood in a relation to the defendant which made this duty owing to him. He was aboard the vessel and left it over this gangplank in the performance of his duty, a duty which was usually performed by custom house officers in such cases and of which it is to be inferred the defendant had notice.”

In the case of “The City of Naples,” *Gilchrist et al vs. Naples*, 69 Fed. Rep. 794, the Libellant was a grain inspector and while in discharge of his official duty of inspecting the vessel preparatory to shipping a cargo of grain, he fell down a dark and unguarded hatchway. He testified he was following the direction pointed out to him by the captain; he testified that the lower deck was lighted only by two candles which were at a considerable distance from the hatchway into which he fell and which was invisible in the dark. The Court held “The Libellant was not on the vessel as a mere licensee. He was there in the discharge of an official duty in which the vessel itself had an interest for it could not receive its cargo until it had been inspected. The right and duty of the Libellant to inspect the vessel did not authorize him to take command of her or to give orders to her crew to prepare her for inspection or to light up the vessel for that purpose.”

The case of *Law vs. Grand Trunk Ry. Co.*, 72 Maine 313, held that the owner of a wharf where foreign laden vessel discharge, are liable to custom officers who are required to visit the premises in the performance of their duties for personal injuries received while in the exercise of due care because of the unsafe or unsuitable condition of the wharf. It further held that a custom officer whose duty is to watch for smugglers and prevent smuggling

may be in the exercise of due care when in the course of his duty he passes over a wharf where a foreign laden vessel is lying in the night time and without a lantern.

In the case of *Tobin vs. P. S. & P. R. Co.*, 59 Maine 183, it [32] was held that a railway corporation is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in their platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving their platform in an unsafe condition.

The Court's attention is specifically called to the case of *Christy v. Ulrich et al*, 113 Cal. App. 138; 298 Pac. Rep. page 135. This was a case where the plaintiff was acting under the employment of the State of California as a resident engineer in charge of the construction of a state highway bridge. The bridge was being constructed under contract by the defendant, Ulrich. The duties of the plaintiff were to inspect the work under construction. Plaintiff was watching the progress of the workmen in pouring and tamping concrete. The tamper happened to break and one of the workmen said there was another tamper on a cross-runway at "Bent 2."

Plaintiff volunteered to get this tamper for the workmen. He walked along the main runway to the cross-runway at "bent 2," picked up the tamper and returned to the main runway, where one of the planks upon which he stepped gave way and precipitated him into the creek bed causing the injuries complained of.

The defendants insisted the plaintiff was a mere licensee to whom they owed no duty except to abstain from willful and wanton negligence. In this respect the Court stated as follows:

“The respondent was not a mere licensee. The work was being performed upon a public highway right of way; the respondent was a state employee assigned to the highway division of the state department of public works; his duties, at the time of the accident, were to inspect the work under construction; and, for this purpose, it was necessary for him to go upon the scaffolding and other portions of the work as it progressed. Immediately preceding [33] the accident, he was inspecting the pouring of concrete in “Bent No. 3.” He saw that the tamper was broken and that the tamping of the concrete was not being done properly. He volunteered to get the workmen another tamper, and was injured while returning with that implement. In this he may have been acting outside the scope of his employment, but it must be remembered that he is not suing his employer in this action for injuries caused during the course of employment. He is resting his case on the negligence of the contractor. It is conceded that it was his duty to inspect all portions of the work, and the fact that he was voluntarily carrying a tool to the workmen while passing over the main runway does not alter his status as an invitee.”

The Court further stated “He was not on that runway upon any private business of his own or from mere curiosity or in violation of orders of inspections. He was there because his duties required him to be there. The fact that at the moment of the accident he was carrying a tool to

the workmen does not change the status because this was in aid of the duties he had to perform.”

Certainly the foregoing cases are analogous to the case at bar and they show conclusively that Libellant at the time of his accident was not a mere licensee but was an invitee and as such the respondent owed him at least ordinary care.

One of the contentions Respondent raises in its exceptions is the effect of Executive Order No. 9054, 7 Fed. Reg. 837 as amended by Executive Order No. 9244, 7 Fed. Reg. 7327. Certainly if there is anything to Respondent's point in this connection, it would at most be a special defense to be pleaded in its answer and not be raised by way of exceptions. In fact the evidence in this case will show that at the time of the accident, to-wit: August 6, 1944, Tide Water Associated Oil Company, a corporation, was the owner and operator of [34] the said vessel “SS Frank G. Drum” and that the War Shipping Administration did not take over the operations of said vessel until sometime subsequent to the happening of the accident.

Wherefore Libellant prays that the exceptions of both Respondents be disallowed and that they be directed to answer Libellant's Libel forthwith.

Respectfully submitted,

GAINES HON, and
IRVING FEINTECH,

By GAINES HON,

Proctors for Libellant [35]

No. 11757

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,
Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL
COMPANY, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

LASHER B. GALLAGHER,
458 South Spring Street, Los Angeles 13,
Proctor for Appellant.

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COMPANY, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

Foreword.

Appellee Bethlehem predicates its entire argument on three premises: (A) None of its employees was on board the vessel from 3:30 P. M., August 5, 1944, and the time of the accident on Sunday night; (B) the contract was not one of bailment; and (C) if it was negligent, such negligence was not a proximate cause of the injuries.

Appellee Richardson makes no attempt to answer appellant's specifications of error 3, 4, 5 and 6 and the opening argument thereon, confining himself to specifications 1 and 2. He claims that no argument was advanced by appellant in support of assignment number 6 and that he is willing to stand on the findings of fact and conclusions of law as signed by the trial judge. Specification number

6 refers to errors of the trial court in its findings of fact and conclusions of law and was most certainly argued in the opening brief (pp. 32-51).

Reply to Appellee Bethlehem.

Appellant does not agree with the assumptions of appellee Bethlehem in its "Summary of Argument." Appellant's points are as set forth in its opening brief. Bethlehem is the only party which could have been responsible for the removal of the safety equipment around the port bunker hatch, the *affirmative* act of raising it off the iron support-leg and leaning it against bulkhead, and leaving it unguarded and unlighted when its workmen *temporarily* left the job in an unfinished state at or about 3:30 P. M. on August 5, 1944. It is apparently the position of Bethlehem that if an independent contractor is employed to perform work on a vessel and in doing so *creates* a dangerous condition by *affirmative* action, the employer of the independent contractor is under a legal duty to erect barricades or illuminate the said danger each time there is a temporary absence of the contractor's servants. This is a novel contention. So novel, in fact, that Bethlehem's proctors were unable to cite a single authority in support thereof. Appellant refers to the following authorities:

Restatement of the Law of Torts, Vol. 2, Secs. 409-429;

Restatement of the Law of Torts, Vol. 2, Secs. 383-387;

Hall v. Barber Door Co., 218 Cal. 412, 23 P. (2d) 279;

Donahoo v. Kress House Moving Corp., 25 Cal. (2d) 237, 153 P. (2d) 349;

27 American Jurisprudence, Sec. 52, p. 530.

Bethlehem erects a straw man and gratuitously asserts that "Associated recognized that this appeal must fail unless this court believes, contrary to the trial court, that the FRANK G. DRUM was delivered to Bethlehem as 'bailee' for the repairs." (Beth. Br. p. 7.)

Appellant contends that there was a bailment for the purpose of repairs but if there was no bailment such conclusion would not result in any exoneration of Bethlehem. The authorities cited hereinabove and the case of *Crane Elevator Co. v. Lippert*, 63 Fed. 943, point conclusively to liability on the part of Bethlehem *if* appellee Richardson is entitled to recover damages from anyone.

It seems to appellant that there was a bailment for the purpose of general and specific repairs even though a "security watch" was maintained. The cases of *International etc. v. Fletcher*, 296 Fed. 855, and *Newport News etc. Co. v. U. S.*, 34 F. (2d) 100, support this view.

Appellee Bethlehem also ignores the rule that Associated, not having *created* any dangerous condition, is entitled to indemnity from Bethlehem. No overt act of negligence on the part of appellant is proved by the evidence. If, *which appellant denies*, it was responsible to Richardson, the basis of responsibility is that it did not put the area of the port bunker in the same condition as it was up to the time Bethlehem commenced the work. It is reasonably certain that if Bethlehem, upon temporarily leaving the uncompleted job, had replaced the hatch on the support and roped off the area, Richardson would not have fallen into the hatch. If there was any negligence in leaving the hatch open and unguarded, such negligence continued in unbroken sequence up to the instant of the

accident. Under these circumstances the rule of indemnity as set forth in 27 American Jurisprudence, page 467, section 18, is directly applicable.

Appellee Bethlehem contends that even though it created the dangerous condition it was under no duty to illuminate it at night. In the *Crane* case the court says:

“Having placed obstructions in the hall, the duty rested upon the plaintiff in error to exercise reasonable care and prudence to protect from injury those having lawful occasion to use it, by means of *lights* or *other suitable safeguards*. This duty required the exercise of care and diligence on *its* part in proportion to the danger occasioned by the presence of these obstructions. It saw fit wholly to neglect the performance of this duty. It relied upon the lighting of the hall by the owner of the building as the sole means of protection against injury from these obstructions. Having intrusted to another the discharge of a *duty* resting upon *itself*, the plaintiff in error is responsible for a failure in its performance.” (Emphasis added.)

Crane Elevator Co. v. Lippert, 63 Fed. at 947.

In its extremity—being unable to answer the statements of the Circuit Court of Appeals in the *Crane* case—appellee Bethlehem says: “Since the suit was against the elevator company alone, the court found this concern negligent and liable to the injured boy.” (Beth. Br. p. 11.) In other words, appellee Bethlehem advances the ridiculous contention that the only reason for the independent contractor being held liable was that the injured boy had not sued the owner of the building and therefore the court held the elevator company guilty of actionable negligence even though such holding was not justified under the law. The court did not hold that the “elevator company’s duties

and responsibilities were co-extensive with those of the owner.” (Beth. Br. p. 11.) But, if it did, Bethlehem would certainly be guilty of actionable negligence.

Bethlehem’s unjustifiable position seems to be that it is not liable to either Richardson or Associated, pursuant to General Admiralty Rule 56, for the following reasons: 1. Although it caused the safety measures taken by Associated to be removed and left the hatch wide open, without any ropes or barricades, it cannot be liable because none of its employees was working on the vessel on Sunday night; and, 2, the “ship’s officers,” who saw the hatch open and knew the rope was not in place, did not close the hatch or rope it off. There is no evidence showing that Humble—the only deck officer aboard on Sunday—knew anything about the condition of the hatch. Frederick, the chief mate, left the vessel at approximately 3:30 P. M. on Saturday and did not return until Monday morning. He testified that the only night he observed that the hatch was open it was lighted. [Ap. 468.] He also testified that “as to this hatch, I didn’t know whether they were coming back at 12 o’clock at night, 8 o’clock or any other time. All I *knew* was they had knocked off and left the hatch open and I assumed they were coming back to work that night.” [Ap. 477.]

Frederick was not, individually or as an employee of Associated—if he was an employee—required to anticipate that the hatch was going to be left open, unguarded, unroped and unlighted by Bethlehem from 3:30 P. M. Saturday until Monday morning. Therefore, no knowledge of the condition can be brought home to Associated through Frederick.

The Captain had not been aboard the vessel for more than 30 hours before the time of the accident. [Ap. 489.] There is no testimony showing that Bengston knew that Bethlehem left the hatch open, etc., from 3:30 P. M. on Saturday until the time of the accident.

Humble, a mate, and Schleef, an engineer, were the only "officers" aboard the vessel on Sunday. Neither of them knew the condition of the hatch.

The evidence establishes without conflict that no employee of Associated removed the rope guard or opened the hatch. Therefore, those acts must have been done by or for Bethlehem. If there was any duty to close the hatch or to rope it off that duty rested exclusively on Bethlehem. Likewise, if there was any duty to illuminate the area, that duty would arise only because the condition of the open hatch was a dangerous condition. Whoever caused the dangerous condition would have the duty of roping it off or lighting it.

Bethlehem states: "The evidence did not prove *who* opened the hatch wide or *who* removed the rope." (Beth. Br. p. 9.) It is true that the *names* of the men who did these things are not in the record but the *only* reasonable inferences as to their identity is that they were employed by Bethlehem. The work that was done in the hatch couldn't have been accomplished without, in the first instance, removing these impediments. Bethlehem sent its superintendent aboard immediately upon the delivery of the vessel to the shipyard and he took charge of all the work.

“Q. Mr. Harrington, assume that, when this ship came into the yard of the Bethlehem Steel Company, the port bunker hatch was roped off and the cover was held at about a 45-degree angle by means of a stiff leg, and your men were going to perform work down in that bunker hatch consisting of installing the staging and doing lifting, *they* would open up the bunker hatch to permit them to get down into the hold, wouldn't they? A. Yes, sir.” [Ap. 341.]

The only other entity which did anything about the port bunker tank, excepting Bethlehem, was a ship service company engaged by *Bethlehem* to gas-free the tank.

“Mr. McHose: The facts are that the California Ship Service was employed by the Bethlehem Company to do this work.

Q. The work is called for by the contract and it (Bethlehem) is to be *responsible*? Is that correct, Mr. Courtier? A. Yes, sir.” [Ap. 387.]

Associated is not legally responsible for dangerous conditions caused by Bethlehem or its employees. It was under no legal duty to follow Bethlehem around the ship. It did not know when Bethlehem would return to the ship. The work was in progress but temporarily suspended at the time of the accident. If anyone is liable in damages Bethlehem is the candidate for that financial burden. Associated was guilty of no moral or legal wrong. It brought the ship in good and safe condition into Bethlehem's shipyard. It was under no *duty* to interfere with Bethlehem and did not do so.

Reply to Appellee Richardson.

The sum and substance of Richardson's brief is that he is satisfied to rest on the findings of fact, conclusions of law and the order overruling Associated's exceptions to the libel.

Appellant need not repeat the argument in Point II of its Opening Brief as to the insufficiency of the evidence to support the findings of "actionable negligence."

Appellant contends that Richardson was actually and solely responsible for his injuries. He should have requested that parts of the ship not intended to be used as passageways or as a means of getting from one point to another be illuminated or he should have obtained a flashlight or lighted a match. If a man is going to roam about a ship he should at least inform persons aboard about his intentions. Of course, he didn't have to be informed that the deck was absolutely dark because he knew that the moment he boarded the ship.

In *Hardie v. New York etc. Corp.*, 9 F. (2d) 545, a shipyard worker fell into an open coal hatch. The ship had removed the cover. In the case at bar the shipyard opened or caused the port bunker hatch to be completely opened and the ropes removed and left it in said condition. The Court says:

"The case does not involve the ship, which left off the cover. The defendant had nothing to do with that and could not be at fault for it." (9 F. (2d) at 547.)

In the case at bar, this Court may also say:

"The case does not involve the ship, which had nothing to do with opening the hatch or removing the ropes. Associated had nothing to do with that and could not be at fault for it."

The Court also said:

“We say that it is beyond any reasonable limit to say that a man, familiar with possibilities, may trust himself to the darkness of a ship’s deck, which he has not tried, and about which he knows nothing and can learn nothing without light. If he does, he must so feel his steps that each shall be safe; else he has plainly risked that it may find no footing.” (9 F. (2d) 547-548.)

Appellee Richardson introduced, and is bound thereby, documentary evidence consisting of interrogatories addressed to Associated and answered by it. This evidence establishes, as between Richardson and Associated, the following facts: The members of the crew aboard the vessel were there merely as a security watch. They were Asa H. Humble, third mate; J. J. Schleef, chief engineer, and B. Bisnagna, bos’n. The vessel was withdrawn from navigation. The duty of each individual member of the standby crew while the S. S. FRANK G. DRUM was at the Bethlehem Steel Company’s repair yards was to act as security watch. The vessel had been *delivered* to the Bethlehem Steel Corporation’s repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same. There were no fire hazards aboard the vessel. All machinery was shut down. Employees of the shipyard are the only ones who knew the nature of the repairs or why the bunker hatch was uncovered. Why the bunker hatch into which Richardson fell was open and uncovered at 21:00 on August 6, 1944, can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of Associated. The vessel’s crew had nothing to do with uncovering, or lighting or guarding or roping off the

bunker hatch while the vessel was in the shipyard for inspection and repair. There were no fixed lights on the S. S. FRANK G. DRUM that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell. The ship had no portable lights that could have been used for this purpose. [Ap. 376-378.]

Conclusion.

Appellant has shown that it breached no duty owing to appellee Richardson. It did not create the dangerous condition. The dangerous condition was not in any part of the vessel designed or intended to be used as a passage-way. There is no proof showing that any employee or agent or officer of Associated knew that appellee Richardson was going to come aboard the vessel on Sunday night or that at said time the port bunker hatch cover was off the hatch, the ropes absent or that the area was not illuminated or that Richardson intended to or that he was under any duty to traverse or attempt to traverse that particular part of the vessel. In the absence of such knowledge, or of any duty to Richardson, how could there arise any obligation on the part of the standby crew to read Richardson's mind or anticipate that he would do what he did?

If Bethlehem had recreated the safety measures taken by Associated—it *alone* knowing it's workmen were *not* coming back to the vessel from 3:30 P. M. Saturday until Monday—the accident would not have happened. If anyone should justly be called upon to pay damages to Richardson, Bethlehem is responsible because it caused the danger and left it unguarded. In spite of all the general statements as to lighting facilities and "ship's portable lights" a careful reading and analysis of all the

testimony on that subject will demonstrate that there is no evidence proving the availability of any electric outlet belonging to or a part of the vessel into which any "ship's portable light" *could* have been plugged for the purpose of illuminating the particular area. The fact that it was necessary for the shipyard's temporary light man to come aboard and rig up a temporary light after the accident is fairly conclusive evidence that none of the ship's equipment was designed for or suitable to that purpose.

Respectfully submitted,

LASHER B. GALLAGHER,
Proctor for Appellant.

